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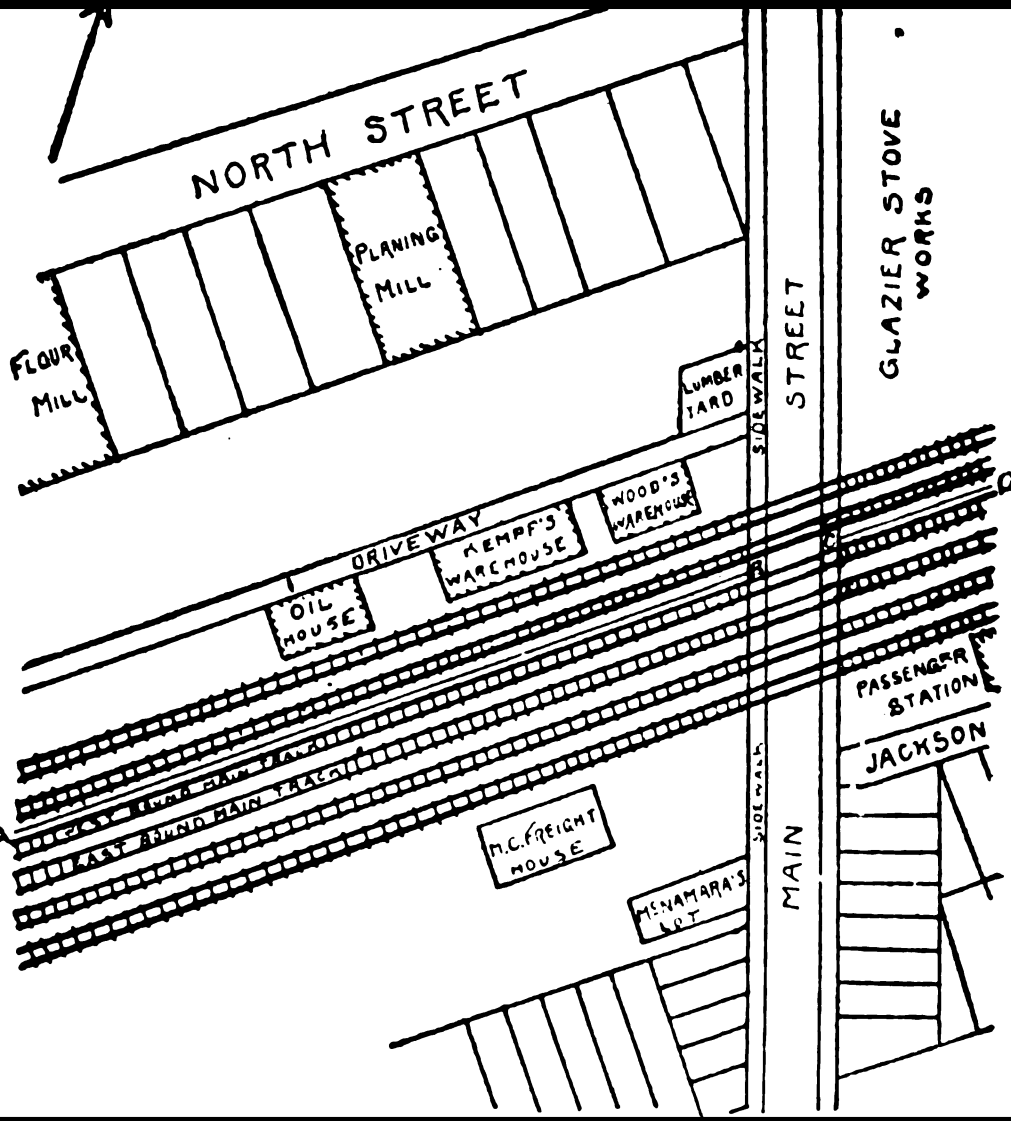


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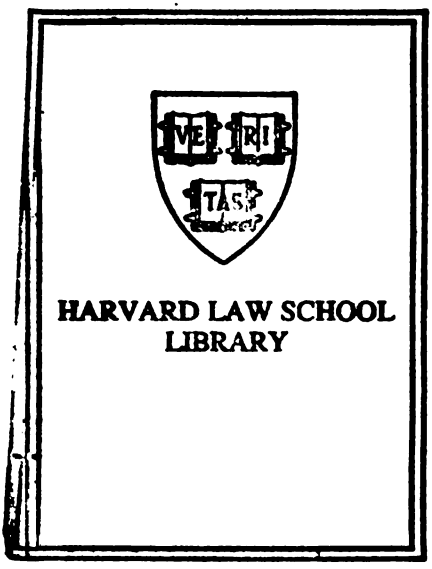


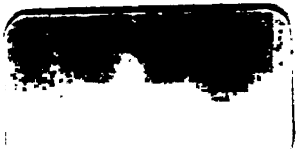

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CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

MAY 25 TO JULY 13, 1897

JOHN A. BROOKS
STATE REPORTER

**VOL. 113**

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# JUDICIAL CIRCUITS.

| COUNTIES. | Circuits |
|---|---|
| Alcona | 23 |
| Alger | 11 |
| Allegan | 20 |
| Alpena | 26 |
| Antrim | 13 |
| Arenac | 34 |
| Baraga | 12 |
| Barry | 5 |
| Bay | 18 |
| Benzie | 28 |
| Berrien | 2 |
| Branch | 15 |
| Calhoun | 5 |
| Cass | 2 |
| Charlevoix | 13 |
| Cheboygan | 33 |
| Chippewa | 11 |
| Clare | 21 |
| Clinton | 29 |
| Crawford | 34 |
| Delta | 25 |
| Dickinson | 25 |
| Eaton | 5 |
| Emmet | 33 |
| Genesee | 7 |
| Gladwin | 34 |
| Gogebic | 32 |
| Grand Traverse | 13 |
| Gratiot | 29 |
| Hillsdale | 1 |
| Houghton | 12 |
| Huron | 24 |
| Ingham | 30 |
| Ionia | 8 |
| Iosco | 23 |
| Iron | 25 |
| Isabella | 21 |
| Jackson | 4 |
| Kalamazoo | 9 |
| Kalkaska | 28 |
| Kent | 17 |
| Keweenaw | 12 |
| Lake | 19 |
| Lapeer | 6 |
| Leelanaw | 13 |
| Lenawee | 1 |
| Livingston | 35 |
| Luce | 11 |
| Mackinac | 33 |
| Macomb | 16 |
| Manistee | 19 |
| Marquette | 25 |
| Mason | 19 |
| Mecosta | 27 |
| Menominee | 25 |
| Midland | 21 |
| Missaukee | 28 |
| Monroe | 22 |
| Montcalm | 8 |
| Montmorency | 26 |
| Muskegon | 14 |
| Newaygo | 27 |
| Oakland | 6 |
| Oceana | 14 |
| Ogemaw | 34 |
| Ontonagon | 32 |
| Osceola | 19 |
| Oscoda | 23 |
| Otsego | 34 |
| Ottawa | 20 |
| Presque Isle | 26 |
| Roscommon | 34 |
| Saginaw | 10 |
| St. Clair | 31 |
| St. Joseph | 15 |
| Sanilac | 24 |
| Schoolcraft | 11 |
| Shiawassee | 35 |
| Tuscola | 24 |
| Van Buren | 9 |
| Washtenaw | 22 |
| Wayne | 3 |
| Wexford | 28 |

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# MUNICIPAL JUDGES.

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RECORDER'S COURT OF DETROIT,

F. H. CHAMBERS AND WILLIAM W. CHAPIN.

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SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

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# TABLE OF CASES REPORTED.


PAGE

Abell, People *v.* ..... 80
Aben *v.* Township of Ecorse ..... 9
Adams, Youngs *v.* ..... 199
Albers' Petition, *in re* ..... 640
Albion, Snyder *v.* ..... 275
Allen, Eno *v.* ..... 399
Anderson, De Cremer *v.* ..... 578
Ann Arbor Savings Bank *v.* Ellison ..... 557
A. P. Cook Co., McKenzie *v.* ..... 452
A. Ruoff Brewing Co., Ruhl *v.* ..... 291
Attorney General *v.* City of Detroit ..... 494
——— *v.* Common Council of Detroit ..... 388
Auditor General *v.* Hutchinson ..... 245
———, Kneeland *v.* ..... 63

Bailey *v.* Holden ..... 402
Baker *v.* Barnett Produce Co. ..... 533
Bannister *v.* Lake Shore & Michigan Southern Railway Co. ..... 530
Barnes, People *v.* ..... 213
Barnett Produce Co., Baker *v.* ..... 533
Baudistel *v.* Michigan Central Railroad Co. ..... 687
Baughman, Shakespeare *v.* ..... 551
Bay Circuit Judge, Hoffman *v.* ..... 109
Bay City, Spanish River Lumber Co. *v.* ..... 181
Beecher's Estate, *in re* ..... 667
Belding *v.* Meloche ..... 223
Benner, Eipper *v.* ..... 75
Bennett, McRae *v.* ..... 47
Bingham Township, St. Johns National Bank *v.* ..... 203




Digitized by Google

PAGE
Blodgett, Kieldsen *v.* ..... 655
Bly *v.* Brady ..... 176
Board of Fire & Water Commissioners of Marquette, Kelsey *v.* ..... 215
Boardman, Douglass *v.* ..... 618
Bostwick, Kock *v.* ..... 302
Bowerman, Kelly *v.* ..... 446
Boyden *v.* Walkley ..... 609
Bradley, Houghton *v.* ..... 599
Brady, Bly *v.* ..... 176
Brewster's Estate, *in re* ..... 561
Brick, Carr *v.* ..... 664
Briggs *v.* Briggs ..... 371
Bromley's Estate, *in re* ..... 53
Brooks, Burrows *v.* ..... 307
Brundage *v.* Shelly ..... 20
Bublitz *v.* Trombley ..... 413
Buchanan *v.* Moore ..... 555
Burrows *v.* Brooks ..... 307
Bush *v.* Delano ..... 321
——— *v.* St. Joseph & Benton Harbor Street Railway Co. ..... 513
Byrnes *v.* Palmer ..... 17

Cable, Harris *v.* ..... 192
Campbell *v.* Western Electric Co. ..... 333, 337
Canine, Perkins *v.* ..... 72
Canton Bridge Co. *v.* City of Eaton Rapids ..... 328
Carr *v.* Brick ..... 664
Carver *v.* School District No. 6 of Battle Creek Township ..... 524
——— *v.* Smith ..... 207
Cheever, Ford *v.* ..... 440
Chicago & Grand Trunk Railway Co., Randall *v.* ..... 115
Chicago & Northwestern Railway Co. *v.* Ellson ..... 30
City of Albion, Snyder *v.* ..... 275
City of Bay City, Spanish River Lumber Co. *v.* ..... 181

Digitized by Google

PAGE
City of Detroit, Attorney General *v.* ..... 494
———, Gray *v.* ..... 657
———, State *v.* ..... 643
City of Eaton Rapids, Canton Bridge Co. *v.* ..... 328
City of Hillsdale, Haynes *v.* ..... 44
City of Monroe, Schwingschlegl *v.* ..... 683
City of Negaunee, Mitchell *v.* ..... 359
City of Saginaw *v.* Swift Electric Light Co. ..... 660
Clark *v.* Lowe ..... 352
——— *v.* Michigan Central Railroad Co. ..... 24
Clarke, Curtis *v.* ..... 458
Cole, People *v.* ..... 83
Collier, Patterson *v.* ..... 12
Collins, Hinkle *v.* ..... 105
Colton, Sheridan *v.* ..... 112
Commissioner of State Land Office, Sherwood *v.* ..... 227
Common Council of Detroit, Attorney General *v.* ..... 388
Comstock *v.* McDonald ..... 626
———, Gates *v.* ..... 127
Cornell *v.* Crane ..... 460
Cotney, Van Baalen *v.* ..... 202
Cox, Kunze *v.* ..... 546
Crane, Cornell *v.* ..... 460
Curtis *v.* Clarke ..... 458

Darmstaetter, Roush *v.* ..... 535
Darveau, Patnode *v.* See 112 Mich. 130.
De Cremer *v.* Anderson ..... 578
Degen *v.* Manistee, Filer City & East Lake Railway Co. ..... 66
De Graw *v.* Emory ..... 672
Delano, Bush *v.* ..... 321
Delaware Township, Perkins *v.* ..... 377
Desmond *v.* Myers ..... 437
Detroit, Attorney General *v.* ..... 494
———, Gray *v.* ..... 657
———, State *v.* ..... 643
Detroit & Erin Plank-Road Co., Murfin *v.* ..... 675

Digitized by Google

PAGE
Detroit Baseball Club *v.* Preston National Bank .... 470
Detroit Citizens' Street Railway Co., Grandorf *v.*.... 496
Detroit Common Council, Attorney General *v.*..... 388
Detroit Pressed Brick Co., Monforton *v.*..... 39
Detroit Sulphite Fibre Co., Zimmerman *v.*..... 1
Diamond Match Co., Kroll *v.* ..... 196
Dollarville Lumber Co., Heighes *v.*..... 518
Douglass *v.* Boardman..... 618
Douville *v.* Farmers' Mutual Fire Insurance Co. of Saginaw County ..... 158
Dumphey, Hilton *v.*..... 241

Early *v.* Standard Life & Accident Insurance Co.... 58
Eaton Rapids, Canton Bridge Co. *v.*..... 328
Ecorse Township, Aben *v.*..... 9
Eipper *v.* Benner..... 75
Ellison, Ann Arbor Savings Bank *v.* ..... 557
Ellson, Chicago & Northwestern Railway Co. *v.*..... 30
Emory, De Graw *v.*..... 672
Eno *v.* Allen..... 399
Evening News Association, Long *v.* ..... 261

Farmers' Fire Insurance Co. *v.* Johnston..... 426
Farmers' Mutual Fire Insurance Co. of Saginaw County, Douville *v.* ..... 158
Fehr, Penrose *v.* ..... 517
Finch *v.* Modern Woodmen of America ..... 646
First National Bank of Niles, Woodcock *v.*..... 236
Foley, Township of Maple Valley *v.* ..... 622
Ford *v.* Cheever..... 440
Forslund, Matthews *v.* ..... 416
Fowler *v.* Fowler ..... 575
Francis *v.* Hurd ..... 250
Friedrich, *in re*..... 468
Frohlich *v.* Graulich ..... 65
Fuchs *v.* Meisel..... 559

Digitized by Google

PAGE
Gadd *v.* Stoner ..... 689
Gates *v.* Comstock ..... 127
Godkin *v.* Obenauer ..... 93
Grand Rapids Democrat, Michigan Trust Co. *v.* ..... 615
Grand Traverse Circuit Judge, Wynkoop *v.* ..... 381
Grandorf *v.* Detroit Citizens' Street Railway Co. ..... 496
Gratopp *v.* Van Eps ..... 590
Graulich, Frohlich *v.* ..... 65
Gray *v.* City of Detroit ..... 657
Grimes *v.* Williams' Estate ..... 450

Hadzsits, Hogan *v.* ..... 568
Hammond *v.* Rathbone ..... 499, 501
Hancock Chemical Co., Schoepper *v.* ..... 582
Hansen, Vincent *v.* ..... 173
Harrington, People *v.* ..... 523
Harris *v.* Cable ..... 192
Hartigan *v.* Michigan Central Railroad Co. ..... 122
Hassler, Rhode *v.* ..... 56
Haynes *v.* City of Hillsdale ..... 44
Heavenrich *v.* Nichols' Estate ..... 508
Heighes *v.* Dollarville Lumber Co. ..... 518
Hendrick *v.* Minor Lumber Co. ..... 52
Hiller, People *v.* ..... 209
Hillsdale, Haynes *v.* ..... 44
Hilton *v.* Dumphey ..... 241
Hinkle *v.* Collins ..... 105
Hoffman *v.* Bay Circuit Judge ..... 109
Hogan *v.* Hadzsits ..... 568
Holden, Bailey *v.* ..... 402
Holt, Webb *v.* ..... 338
Home Savings Bank *v.* Wayne Circuit Judge ..... 385
Houghton *v.* Bradley ..... 599
Hurd, Francis *v.* ..... 250
Hurton *v.* Hurton ..... 634
Hutchinson, Auditor General *v.* ..... 245

Digitized by Google

PAGE
Improved Order Knights of Pythias, Supreme Lodge Knights of Pythias *v.* ..... 133
*In re* Albers' Petition ..... 640
——— Beecher's Estate ..... 667
——— Brewster's Estate ..... 561
——— Bromley's Estate ..... 53
——— Friedrich ..... 468
——— King's Estate ..... 606
——— Schulz's Estate ..... 592

Jackson *v.* Leech's Estate ..... 391
———, Smith *v.* ..... 511
Johnston, Farmers' Fire Insurance Co. *v.* ..... 426
Jones *v.* Merrill ..... 433

Kay *v.* Towsley ..... 281
Kelly *v.* Bowerman ..... 446
Kelsey *v.* Board of Fire and Water Commissioners of Marquette ..... 215
Kerstetter, Parks *v.* ..... 520
Kieldsen *v.* Blodgett ..... 655
Kilbride, Nelson *v.* ..... 637
King's Estate, *in re* ..... 606
Kinney *v.* Onsted ..... 96
Kirkpatrick *v.* Mehalitch ..... 631
Kneeland *v.* Auditor General ..... 63
Kock *v.* Bostwick ..... 302
Kroll *v.* Diamond Match Co. ..... 196
Kunze *v.* Cox ..... 546

Lake Shore & Michigan Southern Railway Co., Bannister *v.* ..... 530
Lamb, McDougall *v.* ..... 69
Landis *v.* Landis ..... 354
——— *v.* Smith ..... 407
Lautenschlager, McKenzie *v.* ..... 171
Lawton, Rentchler *v.* ..... 14
Leech's Estate, Jackson *v.* ..... 391

Digitized by Google

PAGE
Lemp *v.* Raven ..... 375
Levy *v.* O'Leary ..... 423
Lockwood *v.* Noble ..... 418
Long *v.* Evening News Association ..... 261
Lowe, Clark *v.* ..... 352

Mabley & Co., Union Trust Co. *v.* ..... 478
McDonald *v.* Minneapolis, St. Paul & Sault Ste. Marie Railway Co. ..... 484
———, Comstock *v.* ..... 626
McDougall *v.* Lamb ..... 69
McKenzie *v.* A. P. Cook Co. ..... 452
——— *v.* Lautenschlager ..... 171
McMorran *v.* Moore ..... 101
McRae *v.* Bennett ..... 47
Manistee, Filer City & East Lake Railway Co., Degen *v.* ..... 66
Maple Valley Township *v.* Foley ..... 622
Marble *v.* Minneapolis, St. Paul & Sault Ste. Marie Railway Co. ..... 191
Marquette Board of Fire & Water Commissioners, Kelsey *v.* ..... 215
Martin's Estate, Union Banking Co. *v.* ..... 521
Mason *v.* Wierengo's Estate ..... 151
Mather, Michigan Mutual Life Insurance Co. *v.* ..... 357
Matthews *v.* Forslund ..... 416
Mehalitch, Kirkpatrick *v.* ..... 631
Meisel, Fuchs *v.* ..... 559
Meloche, Belding *v.* ..... 223
Menominee Bay Shore Lumber Co., O'Connell *v.* ..... 124
Menominee Electric Light, Railway & Power Co., Swanson *v.* ..... 603
Merrell, Munroe *v.* ..... 491
Merrill, Jones *v.* ..... 433
Michigan Central Railroad Co., Baudistel *v.* ..... 687
———, Clark *v.* ..... 24
———, Hartigan *v.* ..... 122

Digitized by Google

PAGE
Michigan Mutual Life Insurance Co. *v.* Mather ..... 357
Michigan Trust Co. *v.* Grand Rapids Democrat ..... 615
Miller, Stark *v.* ..... 465
Milwaukee Mechanics' Insurance Co., Miotke *v.* ..... 166
Miner *v.* Raymond ..... 28
Minkley *v.* Township of Springwells ..... 347
Minneapolis, St. Paul & Sault Ste. Marie Railway Co., McDonald *v.* ..... 484
———, Marble *v.* ..... 191
Minor Lumber Co., Hendrick *v.* ..... 52
Miotke *v.* Milwaukee Mechanics' Insurance Co. ..... 166
Mitchell *v.* City of Negaunee ..... 359
Modern Woodmen of America, Finch *v.* ..... 646
Moloney, People *v.* ..... 536
Monforton *v.* Detroit Pressed Brick Co. ..... 39
Monroe, Schwingschlegl *v.* ..... 683
Moore, Buchanan *v.* ..... 555
———, McMorran *v.* ..... 101
Morch *v.* Toledo, Saginaw & Muskegon Railway Co. 154
Motley *v.* Wickoff ..... 231
Munroe *v.* Merrell ..... 491
Murfin *v.* Detroit & Erin Plank-Road Co. ..... 675
Myers, Desmond *v.* ..... 437

Negaunee, Mitchell *v.* ..... 359
Nelson *v.* Kilbride ..... 637
Nestell, Ward *v.* ..... 185
Nichols' Estate, Heavenrich *v.* ..... 508
Noble, Lockwood *v.* ..... 418
Northwestern Terra-Cotta Co., Smalley *v.* ..... 141

Oakland County Savings Bank *v.* State Bank of Carson City ..... 284
Obenauer, Godkin *v.* ..... 93
O'Connell *v.* Menominee Bay Shore Lumber Co. ..... 124
O'Leary, Levy *v.* ..... 423
Onsted, Kinney *v.* ..... 96

Digitized by Google

PAGE
Palmer, Byrnes *v.* ..... 17
Parker, Rathbun *v.* ..... 594
Parks *v.* Kerstetter ..... 520
Patnode *v.* Darveau. See 112 Mich. 130.
Patterson *v.* Collier ..... 12
Penrose *v.* Fehr ..... 517
People *v.* Abell ..... 80
——— *v.* Barnes ..... 213
——— *v.* Cole ..... 83
——— *v.* Harrington ..... 523
——— *v.* Hiller ..... 209
——— *v.* Moloney ..... 536
——— *v.* Rush ..... 539
——— *v.* Snowberger ..... 86
——— *v.* Walker ..... 367
——— *v.* Yeager ..... 228
Perkins *v.* Canine ..... 72
——— *v.* Township of Delaware ..... 377
Pontiac, Oxford & Northern Railroad Co., Soper *v.* 443
Potter *v.* Tolbert ..... 486
Preston National Bank, Detroit Baseball Club *v.* ... 470

Randall *v.* Chicago & Grand Trunk Railway Co. ... 115
Rathbone, Hammond *v.* ..... 499, 501
Rathbun *v.* Parker ..... 594
Raven, Lemp *v.* ..... 375
Raymond, Miner *v.* ..... 28
Rentchler *v.* Lawton ..... 14
Rhode *v.* Hassler ..... 56
Rickel, Sakol *v.* ..... 476
Riley Township, White *v.* ..... 295
Ross' Estate, Sullivan *v.* ..... 311, 315
Roush *v.* Darmstaetter ..... 535
Ruhl *v.* A. Ruoff Brewing Co. ..... 291
Rush, People *v.* ..... 539

Saginaw *v.* Swift Electric Light Co. ..... 660
Saginaw Circuit Judge, Union Street-Railway Co. *v.* 694

Digitized by Google

PAGE
St. Johns National Bank *v.* Township of Bingham.. 203
St. Joseph & Benton Harbor Street Railway Co., Bush *v.* ..... 513
Sakol *v.* Rickel ..... 476
Saline Township, Shaw *v.* ..... 342
Schick, Weshgyl *v.* ..... 22
Schoepper *v.* Hancock Chemical Co. ..... 582
School District No. 6 of Battle Creek Township, Carver *v.* ..... 524
Schulz *v.* Schulz ..... 502
Schulz's Estate, *in re* ..... 592
Schwingschlegl *v.* City of Monroe ..... 683
Scranton *v.* Wheeler ..... 565
Shakespeare *v.* Baughman ..... 551
Shannon, Sligh Furniture Co. *v.* ..... 473
Shaw *v.* Township of Saline ..... 342
Shelly, Brundage *v.* ..... 20
Sherwood *v.* Commissioner of State Land Office ..... 227
Sheridan *v.* Colton ..... 112
Sligh Furniture Co. *v.* Shannon ..... 473
Smalley *v.* Northwestern Terra-Cotta Co. ..... 141
Smith *v.* Jackson ..... 511
———, Carver *v.* ..... 207
———, Landis *v.* ..... 407
Snowberger, People *v.* ..... 86
Snyder *v.* City of Albion ..... 275
Soper *v.* Pontiac, Oxford & Northern Railroad Co.. 443
Spanish River Lumber Co. *v.* City of Bay City ..... 181
Springwells Township, Minkley *v.* ..... 347
Standard Life & Accident Insurance Co., Early *v.*.. 58
Stark *v.* Miller ..... 465
State *v.* City of Detroit ..... 643
State Bank of Carson City, Oakland County Savings Bank *v.* ..... 284
Stevens *v.* Yale ..... 680
Stoner, Gadd *v.* ..... 689
Sullivan *v.* Ross' Estate ..... 311, 315

Digitized by Google

PAGE

Supreme Lodge Knights of Pythias *v.* Improved Order Knights of Pythias ..... 133
Swanson *v.* Menominee Electric Light, Railway & Power Co. ..... 603
Swift Electric Light Co., City of Saginaw *v.* ..... 660

Taylor, White *v.* ..... 543
Tolbert, Potter *v.* ..... 486
Toledo, Saginaw & Muskegon Railway Co., Morch *v.* 154
Township of Bingham, St. Johns National Bank *v.* ... 203
Township of Delaware, Perkins *v.* ..... 377
Township of Ecorse, Aben *v.* ..... 9
Township of Maple Valley *v.* Foley ..... 622
Township of Riley, White *v.* ..... 295
Township of Saline, Shaw *v.* ..... 342
Township of Springwells, Minkley *v.* ..... 347
Towsley, Kay *v.* ..... 281
Trombley, Bublitz *v.* ..... 413

Union Banking Co. *v.* Martin's Estate ..... 521
Union Street-Railway Co. *v.* Saginaw Circuit Judge 694
Union Trust Co. *v.* Mabley & Co. ..... 478

Van Baalen *v.* Cotney ..... 202
Van Eps, Gratopp *v.* ..... 590
Vincent *v.* Hansen ..... 173

Walker, People *v.* ..... 367
Walkley, Boyden *v.* ..... 609
Ward *v.* Nestell ..... 185
Wayne Circuit Judge, Home Savings Bank *v.* ..... 385
Webb *v.* Holt ..... 338
Weshgyl *v.* Schick ..... 22
Western Electric Co., Campbell *v.* ..... 333, 337
Wheeler, Scranton *v.* ..... 565
White *v.* Taylor ..... 543
——— *v.* Township of Riley ..... 295
——— *v.* Whittal ..... 493

Digitized by Google

PAGE
Whittal, White *v.* ..... 493
Wickoff, Motley *v.* ..... 231
Wierengo's Estate, Mason *v.* ..... 151
Williams' Estate, Grimes *v.* ..... 450
Woodcock *v.* First National Bank of Niles ..... 236
Wynkoop *v.* Grand Traverse Circuit Judge ..... 381

Yale, Stevens *v.* ..... 680
Yeager, People *v.* ..... 228
Youngs *v.* Adams ..... 199

Zimmerman *v.* Detroit Sulphite Fibre Co. ..... 1

181 CASES.

Digitized by Google

# TABLE OF CASES CITED.


PAGE.

Able *v.* McGuigan, 78 Mich. 415 ..... 422
Adreveno *v.* Life Ass'n, 38 Fed. 806 ..... 655
Albany & Boston Min. Co. *v.* Auditor General, 37 Mich. 391 ..... 248
Alcona Co. *v.* White, 54 Mich. 505 ..... 244
Allis *v.* McLean, 48 Mich. 428 ..... 682
Allison *v.* Ward, 63 Mich. 128 ..... 180
Allore *v.* Jewell, 94 U. S. 506 ..... 413
Allured *v.* Voller, 107 Mich. 476 ..... 435, 436
Alpern *v.* Churchill, 53 Mich. 613 ..... 589
Alterauge *v.* Christiansen, 48 Mich. 60 ..... 421
American Fire Ins. Co. *v.* Pringle, 2 Serg. & R. 138 ..... 283
Anderson *v.* Hill, 54 Mich. 485 ..... 244
——— *v.* Walter, 34 Mich. 113 ..... 178
Antcliff *v.* June, 81 Mich. 492 ..... 126
Appeal of Black, 83 Mich. 513 ..... 617
Appeal of Clark, 100 Mich. 448 ..... 617
Appeal of Palmer, 1 Doug. (Mich.) 422 ..... 459
Arbegust *v.* City of Louisville, 2 Bush, 271 ..... 362
Arnold *v.* School District, 78 Mo. 226 ..... 529
Ashman *v.* Railroad Co., 90 Mich. 567 ..... 685
Attorney General *v.* Ruggles, 59 Mich. 123 ..... 180
Atwood *v.* Gillett, 2 Doug. (Mich.) 206 ..... 490
Auditor General *v.* Jenkinson, 90 Mich. 523 ..... 249
——— *v.* Longyear, 110 Mich. 223 ..... 249
Austin *v.* First Nat. Bank, 100 Mich. 618 ..... 103
——— *v.* Munro, 47 N. Y. 360 ..... 394
Averill *v.* Perrott, 74 Mich. 296 ..... 591

Bacon *v.* Kent Probate Judge, 100 Mich. 183 ..... 510
Bailey *v.* Bailey, 25 Mich. 185 ..... 691
Bailey's Estate, *in re*, 47 Hun, 477 ..... 394, 395
Banghart *v.* Hyde, 94 Mich. 49 ..... 553
Bank of Montreal *v.* Page, 98 Ill. 109 ..... 489
Bantz *v.* Basnett, 12 W. Va. 772 ..... 233
Barber *v.* Milner, 43 Mich. 248 ..... 439
Bargh *v.* Ermeling, 110 Mich. 164 ..... 417
Barker *v.* Cleveland, 19 Mich. 230 ..... 666
——— *v.* Township of Vernon, 63 Mich. 516 ..... 620
Barnes *v.* Marshall, 102 Mich. 248 ..... 692
Barney *v.* Fuller, 133 N. Y. 605 ..... 552, 554
Barnowsky *v.* Helson, 89 Mich. 523 ..... 589
Barry *v.* Railroad Co., 92 N. Y. 289 ..... 27
Batchelor *v.* Accident Ass'n, 34 Wkly. L. Bulletin, 239 ..... 62
Bates *v.* Vary, 40 Ala. 441 ..... 394, 395
Baudistel *v.* Recorder, etc., of City of Jackson, 110 Mich. 357 ..... 687




Digitized by Google

PAGE

Bauer *v.* Wasson, 60 Mich. 194 ..... 178
Baumgart *v.* Modern Woodmen, 85 Wis. 546 ..... 653
Bay City Bridge Co. *v.* Van Etten, 36 Mich. 210 ..... 336
Bayles *v.* Newton, 50 N. J. Law, 549 ..... 92
Bays *v.* State, 6 Neb. 175 ..... 529
Beall *v.* Township of Athens, 81 Mich. 540 ..... 299
Bear *v.* Heasley, 98 Mich. 279 ..... 376, 377
Beardsley *v.* Ontario Bank, 31 Barb. 619 ..... 36
Beaubien *v.* Cicotte, 12 Mich. 459 ..... 327
Beck *v.* Schick, 110 Mich. 665 ..... 23
Becker *v.* Insurance Co., 48 Mich. 610 ..... 165
Beckham *v.* Nacke, 56 Mo. 546 ..... 90
Belleville *v.* Citizens' Horse-Ry. Co., 152 Ill. 171 ..... 699
Berringer *v.* Lake Superior Iron Co., 41 Mich. 305 ..... 178
Bess *v.* Railroad Co., 35 W. Va. 492 ..... 119
Bird *v.* Stark, 66 Mich. 654 ..... 190
Black *v.* City of Manistee, 107 Mich. 60 ..... 498
Black Rabbit Association *v.* Munday, 21 Abb. N. C. 99 ..... 135
Blakemore *v.* Dolan, 50 Ind. 194 ..... 211
Blanchard *v.* Moors, 85 Mich. 380 ..... 180
Blank *v.* Township of Livonia, 95 Mich. 229 ..... 11
Bloomingdale *v.* Chittenden, 75 Mich. 305 ..... 383, 414
Board of Com'rs of Rush Co. *v.* Rushville & Vienna Gravel-Road Co., 87 Ind. 505 ..... 345
Boardman *v.* Acer, 13 Mich. 77 ..... 451
Borck *v.* Michigan Bolt & Nut Works, 111 Mich. 129 ..... 43
Borgards *v.* Insurance Co., 79 Mich. 440 ..... 165
Borough of Susquehanna Depot *v.* Simmons, 112 Pa. St. 384 ..... 613
Boston *v.* Beal, 51 Fed. 306 ..... 206
Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410 ..... 37
Bostwick *v.* Benjamin, 63 Mich. 289 ..... 180
——— *v.* Mahaffy, 48 Mich. 342 ..... 80
Bower *v.* Earl, 18 Mich. 377 ..... 190
Bowker *v.* Johnson, 17 Mich. 42 ..... 80, 353
Bowyer *v.* Knapp, 15 W. Va. 277 ..... 233
Bradley *v.* Carnes, 94 Tenn. 27 ..... 691, 692
——— *v.* Slater, 50 Neb. 682 ..... 153
Brant *v.* Iron Co., 93 U. S. 326 ..... 692
Brassel *v.* Railway Co., 101 Mich. 11 ..... 9
Brevig *v.* Railway Co., 64 Minn. 168, 172 ..... 120
Brezee *v.* Powers, 80 Mich. 172 ..... 685
Briesenmeister *v.* Supreme Lodge Knights of Pythias, 81 Mich. 525 ..... 178
Brooks *v.* Hydorn, 76 Mich. 273 ..... 591
Brown *v.* Bell, 58 Mich. 58 ..... 325, 405
——— *v.* Blanchard, 39 Mich. 790 ..... 103
——— *v.* Dean, 52 Mich. 267 ..... 180
——— *v.* Forsche, 43 Mich. 501 ..... 393
——— *v.* Insurance Co., 65 Mich. 314 ..... 654
——— *v.* Littlefield, 11 Wend. 467 ..... 318
Brunner *v.* City of Bay City, 46 Mich. 236 ..... 620
Buhl *v.* Depot Co., 98 Mich. 596 ..... 688
Bullock *v.* Horn, 44 Ohio St. 420 ..... 147
Burford *v.* McCue, 53 Pa. St. 427 ..... 108
Burk *v.* Muskegon Machine & Foundry Co., 98 Mich. 614 ..... 149

Digitized by Google

PAGE

Burns *v.* Byrne, 45 Iowa, 285 ..... 187
Burt *v.* McBain, 29 Mich. 268 ..... 576
——— *v.* Wadsworth, 39 Mich. 126 ..... 248
Butler *v.* Hildreth, 3 Metc. (Mass.) 49 ..... 318
Byers *v.* Byers, 65 Mich. 600 ..... 449
Byrne *v.* Railroad Co., 104 N. Y. 362 ..... 27

Calder *v.* Moran, 49 Mich. 14 ..... 80
Camp *v.* Township of Algansee, 50 Mich. 4 ..... 244
Campau *v.* Dubois, 39 Mich. 274 ..... 189
——— *v.* Lafferty, 50 Mich. 118 ..... 189
——— *v.* Michell, 103 Mich. 623 ..... 153
——— *v.* Moran, 31 Mich. 282 ..... 553
——— *v.* North, 39 Mich. 606 ..... 85
Campbell *v.* Campbell, 54 Wis. 90 ..... 576
——— *v.* City of Wyandotte, 105 Mich. 1 ..... 334, 337
Carbiener *v.* Montgomery, 97 Iowa, 659 ..... 625
Carleton *v.* Jenness, 42 Mich. 110 ..... 490
Carley *v.* Fox, 38 Mich. 387 ..... 342
Carroll *v.* Van Rensselaer, Har. Ch. 225 ..... 459
Carter *v.* Hill, 81 Mich. 280 ..... 598
Cartwright *v.* Johnston, 110 Mich. 312 ..... 428–430
Case *v.* Frey, 24 Mich. 251 ..... 642
Castner *v.* Insurance Co., 46 Mich. 18 ..... 169
Cavenaugh *v.* Jakeway, Walk. Ch. 344 ..... 57
Central Trust Co. of New York *v.* Milwaukee St. R. Co., 74 Fed. 442 ..... 111
Chaddock *v.* Tabor, 72 N. W. 1093 ..... 319
Chadwick *v.* Chadwick, 59 Mich. 87 ..... 80
Cheney *v.* Harding, 21 Neb. 65 ..... 435
Chicago & Grand Trunk R. Co. *v.* Campbell, 47 Mich. 266 ..... 485
Child *v.* Manufacturing Co., 72 Mich. 623 ..... 69, 178
Chittenden *v.* Witbeck, 50 Mich. 420 ..... 267, 274
Churchill *v.* Scott, 65 Mich. 485 ..... 413
Citizens' State Bank of Monroeville *v.* Kalamazoo Co. Bank, 111 Mich. 313 ..... 286, 288
City of Belleville *v.* Citizens' Horse-Ry. Co., 152 Ill. 171 ..... 699
City of Boston *v.* Beal, 51 Fed. 306 ..... 206
City of Covington *v.* Southgate, 15 B. Mon. 491 ..... 362
City of Crawfordsville *v.* Braden, 130 Ind. 149 ..... 367
City of Detroit *v.* Plank-Road Co., 43 Mich. 144 ..... 699
——— *v.* Railroad Co., 23 Mich. 204, 206 ..... 641
——— *v.* Railway Co., 76 Mich. 421 ..... 641
City of Dubuque *v.* Railroad Co., 39 Iowa, 56 ..... 37
City of New Orleans *v.* Houston, 119 U. S. 265 ..... 206
City of Warren *v.* Davis, 43 Ohio St. 447 ..... 278
Clark *v.* Davis, 32 Mich. 154 ..... 29
———, *in re*, 92 Mich. 351 ..... 617
Clink *v.* Gunn, 90 Mich. 140 ..... 598
Coal Co. *v.* Rosser, 53 Ohio. St. 12 ..... 126
Cobbs *v.* Fire Ass'n, 68 Mich. 465 ..... 446
Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116 ..... 286, 290
Coe *v.* Railroad Co., 10 Ohio St. 372 ..... 37
Cofrode *v.* Wayne Circuit Judge, 79 Mich. 332, 349 ..... 110
Colbath *v.* Jones, 28 Mich. 280 ..... 178

Digitized by Google

PAGE

Cole *v.* Insurance Co., 61 Law T. N. S. 227 ... 61
——— *v.* Millerton Iron Co., 133 N. Y. 164 ... 271
——— *v.* People, 37 Mich. 544 ... 538
Coleman *v.* Ballandi, 22 Minn. 144 ... 309
Collyer *v.* Moulton, 9 R. I. 90 ... 233
Com. *v.* Boynton, 2 Allen, 160 ... 89
——— *v.* Farren, 9 Allen, 489 ... 89
——— *v.* Gray, 150 Mass. 327 ... 92
——— *v.* Inhabitants of Deerfield, 6 Allen, 449 ... 345
——— *v.* Kimball, 21 Pick. 373 ... 212
——— *v.* Nichols, 10 Allen, 199 ... 89
——— *v.* Raymond, 97 Mass. 567 ... 90
——— *v.* Smith, 103 Mass. 444 ... 89, 92
——— *v.* Waite, 11 Allen, 264 ... 89
——— *v.* Warren, 160 Mass. 533 ... 92
Condon *v.* Hughes, 92 Mich. 367 ... 463
Connolly *v.* Keating, 102 Mich. 1 ... 405
Connors *v.* City of Detroit, 41 Mich. 128 ... 248
Constable *v.* Lefever, (Sup.) 21 N. Y. Supp. 38 ... 552
Converse *v.* Blumrich, 14 Mich. 124 ... 459
Cook *v.* Canny, 96 Mich. 398 ... 605
——— *v.* Clinton, 64 Mich. 309 ... 199
——— *v.* Perry, 43 Mich. 623 ... 129
Coon *v.* Anderson, 101 Mich. 295 ... 463
Coover's Appeal, 74 Pa. St. 143 ... 594
Corcoran *v.* City of Detroit, 95 Mich. 84 ... 685
——— *v.* Railroad Co., 6 C. C. A. 231, 56 Fed. 1015 ... 118
Cornell *v.* Markham, 19 Hun, 275 ... 554
Cornish *v.* Graff, 36 Hun, 160 ... 554
Cory *v.* Cory, 37 N. J. Eq. 198 ... 692
Cottrell *v.* Smith, 63 Iowa, 181 ... 439
Cousins *v.* Railway Co., 96 Mich. 390 ... 645
Covington *v.* Southgate, 15 B. Mon. 491 ... 362
Craft *v.* Isham, 13 Conn. 28 ... 581
Crane *v.* Saginaw Circuit Judge, 111 Mich. 496 ... 211
Crawford *v.* Neal, 144 U. S. 585 ... 306
Crawfordsville *v.* Braden, 130 Ind. 149 ... 367
Crisp *v.* Railway Co., 98 Mich. 648 ... 70
Crosby *v.* Railway Co., 58 Mich 458 ... 589

Dalby, *ex parte*, 1 Low. 431 ... 422
Dana *v.* Fiedler, 12 N. Y. 40 ... 108
Daniels *v.* Stevens, 60 Mich. 219 ... 387
Darling *v.* Hurst, 39 Mich. 765 ... 180
Davis *v.* Bilsland, 18 Wall. 659 ... 283
——— *v.* Davis, 84 Mich. 324 ... 682
Davis Sewing Machine Co. *v.* Richards, 115 U. S. 524 ... 580
Dawson *v.* Township of Aurelius, 49 Mich. 479 ... 244
Day *v.* Brownrigg, 10 Ch. Div. 294 ... 138
Dayton *v.* Dakin's Estate, 103 Mich. 65 ... 393
Dean *v.* Mumford, 102 Mich. 510 ... 594
Deeds *v.* Sanborn, 26 Iowa, 419 ... 362
Deiman *v.* City of Ft. Madison, 30 Iowa. 542 ... 362
Detroit *v.* Plank-Road Co., 43 Mich. 144 ... 699
——— *v.* Railroad Co., 23 Mich. 204, 206 ... 641
——— *v.* Railway Co., 76 Mich. 421 ... 641

Digitized by Google

PAGE
Detroit, etc., Plank-Road Co. *v.* Detroit Suburban R. Co., 103 Mich. 585 ..... 677, 679
De Witt *v.* Smith, 63 Mo. 263 ..... 146
Dexter *v.* Cranston, 41 Mich. 448 ..... 384
Dittrich *v.* City of Detroit, 98 Mich. 245 ..... 685
Dodson *v.* Sevars, 52 N. J. Eq. 611 ..... 691
Driftwood Valley Turnpike Co. *v.* Board of Com'rs of Bartholomew Co., 72 Ind. 237 ..... 345
Dubois' Adm'r *v.* Wilson's Trustee, 21 Mo. 213 ..... 283
Dubuque *v.* Railroad Co., 39 Iowa, 56 ..... 37
Ducett *v.* Wolf, 81 Mich. 311 ..... 198
Duchess of Kingston's Case, 2 Smith, Lead. Cas. 784, 808 ..... 666
Dundas *v.* City of Lansing, 75 Mich. 499 ..... 685
Dunn *v.* Dunn, 4 Paige, 430 ..... 435
Dunton *v.* Outhouse, 64 Mich. 419 ..... 459
Durant *v.* Abendroth, 69 N. Y. 151 ..... 572

Eagle Manfg. Co. *v.* Jennings, 29 Kan. 657 ..... 234
Early *v.* Burt, 68 Iowa, 716 ..... 233
Edwards *v.* Village of Three Rivers, 102 Mich. 153 ..... 351
Eliot *v.* Himrod, 108 Pa. St. 578 ..... 572
Ellis *v.* Whitehead, 95 Mich. 105 ..... 200, 294
Erickson *v.* Railway Co., 93 Mich. 414 ..... 157
*Ex parte* Dalby, 1 Low. 431 ..... 422
——— Rockford, etc., R. Co., 1 Low. 345 ..... 422
——— Schollenberger, 96 U. S. 369 ..... 436
Eyke *v.* Lange, 104 Mich. 26 ..... 206

Farber *v.* Railway Co., 116 Mo. 81 ..... 120
Farmers', etc., Bank *v.* Kercheval, 2 Mich. 504 ..... 489, 579
Farmers' Loan & Trust Co. *v.* Railway Co., 3 Dill. 412 ..... 37
Farrah *v.* Bursley, 100 Mich. 552 ..... 417
Farrell *v.* School District, 98 Mich. 43 ..... 530
Farwell *v.* Myers, 64 Mich. 234 ..... 319
Federspiel *v.* Johnstone, 87 Mich. 303 ..... 114
Feige *v.* Babcock, 111 Mich. 538 ..... 150
Felker *v.* Chubb, 90 Mich. 24 ..... 625
Fenn *v.* Bolles, 7 Abb. Prac. 202 ..... 267
Ferris *v.* McQueen, 94 Mich. 367 ..... 326
Fewlass *v.* Abbott, 28 Mich. 270 ..... 107
Fifield *v.* Edwards, 39 Mich. 264 ..... 319
First Nat. Bank *v.* Huber, 75 Hun, 80 ..... 572
Fish *v.* Morse, 8 Mich. 34 ..... 29
Fitzsimmons *v.* Chapman, 37 Mich. 139 ..... 682
Flint, etc., Plank-Road Co. *v.* Woodhull, 25 Mich. 99 ..... 699
Folsom *v.* Teichner, 27 Mich. 107 ..... 103
Ford *v.* Cheever, 105 Mich. 679 ..... 441
——— *v.* Savage, 111 Mich. 144 ..... 353
Foster *v.* Jones, 79 Va. 642 ..... 591
Frank *v.* Morley's Estate, 106 Mich. 635 ..... 80
Fraser *v.* Passage, 63 Mich. 556 ..... 271
Fuchs *v.* Meisel, 102 Mich. 357 ..... 559
Fuller *v.* City of Jackson, 92 Mich. 207 ..... 46

Digitized by Google

PAGE

Gage *v.* Railroad Co., 105 Mich. 335 ..... 302, 345, 346
Gano *v.* Heath, 36 Mich. 441 ..... 523
Gardner *v.* Lloyd, 110 Pa. St. 278 ..... 581
Garey *v.* People, 9 Cow. 640 ..... 591
Gay *v.* Gillilan, 92 Mo. 250 ..... 326
Gebhard *v.* Railway Co., 79 Mich. 586 ..... 532
Geiger *v.* Turnpike Road, 167 Pa. St. 582 ..... 678
George *v.* Electric Light Co., 105 Mich. 1 ..... 361
Germaine *v.* City of Muskegon, 105 Mich. 213 ..... 685
Gilbert *v.* Vanderpool, 15 Johns. 242 ..... 111
Glover *v.* Reid, 80 Mich. 230 ..... 692
Goodno *v.* City of Oshkosh, 31 Wis. 127 ..... 211
Goodnow *v.* Emery Mills, 146 Mass. 261 ..... 478
Goodspeed *v.* Plow Co., 45 Mich. 237 ..... 490
Gorman *v.* Newaygo Circuit Judge, 27 Mich. 138 ..... 149
Goss *v.* Coffin, 66 Me. 432 ..... 422
Graham *v.* King, 50 Mo. 23 ..... 249
Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104 ..... 126
Graves *v.* City of Battle Creek, 95 Mich. 266 ..... 498
Gray *v.* Barton, 62 Mich. 196 ..... 432
Greeley *v.* Stilson, 27 Mich. 153 ..... 639
Green *v.* Railway Co., 110 Mich. 648 ..... 27
Greenwalt *v.* Duncan, 16 Fed. 35 ..... 454
Grenell *v.* Gas Co., 112 Mich. 70 ..... 271
Gridley *v.* Tobacco Co., 71 Mich. 532 ..... 463
Griffin *v.* Griffin, 112 Mich. 87 ..... 454
Guest *v.* Insurance Co., 66 Mich. 98 ..... 169
Gumberg *v.* Treusch, 103 Mich. 543 ..... 326
Gunn *v.* Geary, 44 Mich. 616 ..... 469

Hackley *v.* Mack, 60 Mich. 604 ..... 34
Haddock *v.* Grinnell Manfg. Corp., 109 Pa. St. 382 ..... 574
Hagan *v.* Railroad Co., 86 Mich. 615 ..... 589
Haggerty *v.* Foster, 103 Mass. 17 ..... 572
Haines *v.* Hayden, 95 Mich. 332, 346 ..... 327
Hall *v.* Edrington, 8 B. Mon. 47 ..... 454
Hamilton *v.* People, 46 Mich. 186 ..... 84
Hamilton & Merryman Co. *v.* Township of L'Anse, 107 Mich. 419 ..... 249
Hammond *v.* Railway Co., 83 Mich. 334 ..... 157
——— *v.* Rathbone, 113 Mich. 499 ..... 501
Hand *v.* Auditor General, 112 Mich. 597 ..... 659
Hannah & Lay Mercantile Co. *v.* Mosser, 105 Mich. 18 ..... 145
Hanson *v.* Donkersley, 37 Mich. 184 ..... 633
Hardin *v.* Osborne, 94 Ill. 571 ..... 422
Harrigan *v.* City of Brooklyn, 119 N. Y. 156 ..... 277
Harring *v.* Allen, 25 Mich. 505, 508 ..... 327
Harris *v.* Township of Clinton, 64 Mich. 447 ..... 685
Harrison *v.* Railroad Co., 79 Mich. 409 ..... 157
Hart *v.* Hart, 48 Mich. 175 ..... 637
——— *v.* Shiawassee Circuit Judge, 56 Mich. 592 ..... 509
Haslet *v.* Kent, 160 Pa. St. 85 ..... 572
Hathaway *v.* Bennett, 10 N. Y. 108 ..... 267
Haven *v.* Manufacturing Co., 40 Mich. 290 ..... 682
Haviland *v.* Chace, 39 Barb. 283 ..... 572
Hawkins Point Lighthouse, 39 Fed. 77 ..... 567

Digitized by Google

PAGE
Haxtun Steam Heater Co. *v.* Gordon, 2 N. Dak. 246 ..... 283
Haynes *v.* Knowles, 36 Mich. 407 ..... 549, 550
Healey *v.* Mutual Accident Ass'n, 133 Ill. 556 ..... 62
Heather's Estate, *in re*, 15 Abb. N. C. 197 ..... 395
Heim *v.* Ellis, 49 Mich. 241 ..... 421
Hewitt *v.* Wagar Lumber Co., 38 Mich. 705 ..... 294
Hewson-Herzog Supply Co. *v.* Cook, 52 Minn. 534 ..... 283
Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241 ..... 446
——— *v.* St. Louis, etc., Transp. Co., 10 Fed. 596, 13 Fed. 516, 17 Fed. 478 ..... 430
Hickey *v.* Baird, 9 Mich. 38 ..... 682
Higgins Co. *v.* Higgins Soap Co., 144 N. Y. 462 ..... 136, 137
Hill *v.* Insurance Co., 22 Hun, 187 ..... 62
——— *v.* Webber, 50 Mich. 142 ..... 455
Hillman *v.* Schwenk, 68 Mich. 297 ..... 405
Hinkle's Appeal, 116 Pa. St. 498 ..... 692
Hitchcock *v.* Burgett, 38 Mich. 508 ..... 94
——— *v.* Moore, 70 Mich. 112 ..... 172
Hoey *v.* Pierron, 67 Wis. 262, 270 ..... 306
Hoffman *v.* Buschman, 95 Mich. 538 ..... 57
——— *v.* Railroad Co., 87 N. Y. 25, 30 ..... 120
——— *v.* St. Clair Circuit Judge, 40 Mich. 351 ..... 456
Hohner *v.* Gratz, 52 Fed. 871 ..... 139
Hoke *v.* Hoke, 12 W. Va. 427 ..... 396, 398
Holmes *v.* Holmes, 37 Conn. 296 ..... 136
Home Ins. Co. *v.* Marple, 1 Ind. App. 411 ..... 508
Home Life Ins. Co. *v.* Elwell, 111 Mich. 689 ..... 14
Hooker *v.* Railway Co., 76 Wis. 542 ..... 27
Hoose *v.* Insurance Co., 84 Mich. 321 ..... 169
Horton *v.* Ingersoll, 13 Mich. 413 ..... 187
——— *v.* Williams, 99 Mich. 423 ..... 688
Houghton *v.* Bradley, 110 Mich. 308 ..... 599
Houston, etc., R. Co. *v.* Bolling, 59 Ark. 395 ..... 121
Hovey *v.* Smith, 22 Mich. 170 ..... 342
Howard *v.* Carusi, 109 U. S. 725 ..... 691
Howell *v.* City of Buffalo, 15 N. Y. 512 ..... 277
Howser *v.* Melcher, 40 Mich. 185 ..... 129
Hull *v.* People, 41 Mich. 167 ..... 85
Hurst's Case, 4 Dall. 387 ..... 111
Huse *v.* Washburn, 59 Wis. 414 ..... 150
Huson *v.* Dale, 19 Mich. 35 ..... 577
Hutchinson *v.* Dubois, 45 Mich. 143 ..... 549

*In re* Bailey's Estate, 47 Hun, 477 ..... 394, 395
——— Clark, 92 Mich. 351 ..... 617
——— Heather's Estate, 15 Abb. N. C. 197 ..... 395
——— King's Estate, 110 Mich. 203 ..... 608
——— Medley, 134 U. S. 160 ..... 212
——— Sayles, 92 Mich. 354 ..... 617
——— Woodburn's Estate, 151 Pa. St. 586 ..... 593
International, etc., Ass'n *v.* Walker, 88 Mich. 62 ..... 446
International, etc., R. Co. *v.* Anderson, 82 Tex. 516 ..... 119
Iron Duke Mine *v.* Braastad, 112 Mich. 79 ..... 602
Ironwood Store Co. *v.* Harrison, 75 Mich. 201 ..... 94
Isabelle *v.* Iron Cliffs Co., 57 Mich. 123 ..... 294
Iseminger *v.* Criswell, 98 Iowa, 382 ..... 625

Digitized by Google

| | PAGE |
|---|---|
| Jackson *v.* Robins, 16 Johns. 588 | 692 |
| Jacobson *v.* Miller, 41 Mich. 90 | 666 |
| ——— *v.* Wayne Circuit Judge, 76 Mich. 234 | 110 |
| Jenks *v.* St. Clair Probate Judge, 96 Mich. 122 | 510 |
| Jenness *v.* Carlton, 40 Mich. 343 | 490 |
| ——— *v.* Smith, 64 Mich. 91 | 620 |
| John Hutchinson Manfg. Co. *v.* Pinch, 91 Mich. 156 | 682 |
| Johnson *v.* Emerick, 70 Mich. 215 233 | 490 |
| ——— *v.* Harder, 45 Iowa, 677 | 554 |
| ——— *v.* Seymour, 79 Mich. 156 | 463 |
| Johnston *v.* Insurance Co., 106 Mich. 96 | 430 |
| Jones *v.* Dashner, 89 Mich. 246 | 521 |
| ——— *v.* Jones, 25 Mich. 401 | 691 |
| ——— *v.* Thacker, 61 Ga. 335 | 454 |
| Jordan *v.* White, 38 Mich. 253 | 306 |
| | |
| Kansas City, etc., R. Co. *v.* Kelly, 36 Kan. 655 | 121 |
| Keeler *v.* Keeler, 24 Wis. 522 | 486 |
| Kelly *v.* Roberts, 40 N. Y. 439 | 293 |
| Kelsey *v.* McDonald, 76 Mich. 188 | 198 |
| Kenyon *v.* Woodruff, 33 Mich. 315 | 451 |
| Kilgannon *v.* Jenkinson, 51 Mich. 240 | 74 |
| Kimball *v.* Homan, 74 Mich. 699 | 688 |
| King *v.* Hunter, 65 N. C. 603 | 591 |
| King's Estate, *in re*, 110 Mich. 203 | 608 |
| Kinney *v.* Onsted, 113 Mich. 96 | 27 |
| Knallakan *v.* Beck, 47 Hun, 117 | 555 |
| Kring *v.* Missouri, 107 U. S. 221 | 212 |
| Kwiotowski *v.* Railway Co., 70 Mich. 549 | 532 |
| | |
| Lacey *v.* Davis, 4 Mich. 140 | 340 |
| La Duke *v.* Township of Exeter, 97 Mich. 450 | 12 |
| Lafferty *v.* Railway Co., 71 Mich. 35 | 126 |
| Lake Shore, etc., R. Co. *v.* City of Grand Rapids, 102 Mich. 374 | 33 |
| ——— *v.* Peterson, 144 Ind. 214 | 120 |
| Lambert *v.* Griffith, 50 Mich. 286 | 549 |
| Lamont *v.* Le Fevre, 96 Mich. 177 | 148 |
| Lamotte *v.* Boyce, 105 Mich. 545 | 478 |
| Lampson *v.* Bowen, 41 Wis. 484 | 283 |
| Lane *v.* Ruhl, 108 Mich. 38 | 130 |
| Langworthy *v.* City of Dubuque, 13 Iowa, 86 | 362 |
| ——— *v.* Township of Green, 95 Mich. 93 | 302 |
| Laramore *v.* Chastian, 25 Ga. 592 | 436 |
| Laton *v.* Balcom, 64 N. H. 92 | 186 |
| Latourette *v.* McKeon, 104 Mich. 156 | 405 |
| Laughlin *v.* Railway Co., 62 Mich. 220 | 497 |
| Lautenshlager *v.* Lautenshlager, 80 Mich. 285 | 405 |
| Lay *v.* City of Adrian, 75 Mich. 438 | 278 |
| Lemon *v.* Railway Co., 59 Mich. 623 | 674 |
| Lenawee Co. Sav. Bank *v.* City of Adrian, 66 Mich. 273 | 206 |
| Liddle *v.* Needham, 39 Mich. 147 | 198 |
| Ligare *v.* Peacock, 109 Ill. 94 | 489 |
| Lloyd *v.* Hollenback, 98 Mich. 203 | 404 |
| Logan *v.* McMillan, 5 Dana, 484 | 454 |
| Long *v.* Rodman, 58 Ind. 61 | 396 |
| ——— *v.* Tribune Printing Co., 107 Mich. 207 | 262 |


Digitized by Google

PAGE

Loomis *v.* Armstrong, 49 Mich. 527, 63 Mich. 366 ..... 393
Loranger *v.* Davidson, 110 Mich. 605 ..... 66
Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501 ..... 35
Lowell *v.* Township of Watertown, 58 Mich. 568 ..... 685
Lum *v.* Insurance Co., 104 Mich. 397 ..... 164
Lumbard *v.* Stearns, 4 Cush. 60 ..... 221, 365
Lyell *v.* Goodwin, 4 McLean, 39 ..... 111
Lyon *v.* Receiver of Taxes, 52 Mich. 276 ..... 482
Lyth *v.* Ault, 7 Welsb., H. & G. 669 ..... 233

McArthur *v.* Oliver, 60 Mich. 605 ..... 180
McClellan *v.* Larchar, 45 N. J. Eq. 17 ..... 691
McCrary *v.* Beaudry, 67 Cal. 120 ..... 221
McDaniel *v.* McCoy, 68 Mich. 332 ..... 413
M'Elroy *v.* Mancius, 13 Johns. 121 ..... 318
McGlynn *v.* Post, 21 Abb. N. C. 97 ..... 185
McGuire *v.* McKnight, 101 Mich. 275 ..... 114
McKinney *v.* Curtiss, 60 Mich. 611 ..... 319
McKinnon *v.* McEwan, 48 Mich. 106 ..... 682
McKisson *v.* Davenport, 83 Mich. 211 ..... 455
McLaughlin *v.* Austin, 104 Mich. 489 ..... 318
McLean *v.* Fleming, 96 U. S. 251 ..... 137
Macumber *v.* Beam, 22 Mich. 403 ..... 103
Mahlen *v.* Railway Co., 49 Mich. 585 ..... 532
Malloy *v.* Township of Walker, 77 Mich. 448, 464 ..... 11, 345
Manhattan Ins. Co. *v.* Webster, 59 Pa. St. 227 ..... 170
Marthinson *v.* Insurance Co., 64 Mich. 372 ..... 446
Massey *v.* Colville, 45 N. J. Law, 119 ..... 111
Matt *v.* Protective Soc., 70 Iowa, 455 ..... 655
Matteson *v.* Nathanson, 38 Mich. 377 ..... 490
Matthews *v.* Park Bros. & Co., 159 Pa. St. 579 ..... 69
——— *v.* Tufts, 87 N. Y. 568 ..... 111
Maus *v.* Railroad Co., 27 Ill. 77 ..... 37
Maynard *v.* Ivey, 21 Nev. 241 ..... 147
——— *v.* Vinton, 59 Mich. 139 ..... 172, 326, 327
Medina Township *v.* Perkins, 48 Mich. 67 ..... 11, 280
Medley, *in re*, 134 U. S. 160 ..... 212
Merchants' Bank *v.* State Bank, 10 Wall. 604 ..... 287, 290
Merrick *v.* Mayhue, 40 Mich. 196 ..... 383
Merrill *v.* Humphrey, 24 Mich. 170 ..... 248, 362
Michigan Central R. Co. *v.* Kalamazoo Circuit Judge, 35 Mich. 227 ..... 149
——— *v.* McNaughton, 45 Mich. 87 ..... 455
——— *v.* Smithson, 45 Mich. 212 ..... 478
Michigan Land & Iron Co. *v.* Thoney, 89 Mich. 226 ..... 190
Michigan Trust Co. *v.* Lansing Lumber Co., 103 Mich. 392, 402 ..... 226, 449
——— *v.* State Bank of Michigan, 111 Mich. 306 ..... 286, 288
Midland R. Co. *v.* Stevenson, 130 Ind. 97 ..... 37
Miller *v.* Clark, 56 Mich. 344 ..... 437
——— *v.* Finley, 26 Mich. 249 ..... 178, 180, 523
——— *v.* Morse, 28 Mich. 368 ..... 432
Minneapolis, etc., R. Co. *v.* Marble, 112 Mich. 4 ..... 191
Misner *v.* Darling, 44 Mich. 488 ..... 553
Mitchell *v.* Huron Circuit Judge, 53 Mich. 541 ..... 110
Montague *v.* Allan's Ex'r, 78 Va. 592 ..... 325

Digitized by Google

PAGE
Montgomery *v.* Railway Co., 103 Mich. 46 ... 289
Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585 ... 271
Moore *v.* City of Kalamazoo, 109 Mich. 176 ... 46
——— *v.* Crawford, 130 U. S. 122 ... 439
——— *v.* Township of Kenockee, 75 Mich. 332 ... 11, 280
Morford *v.* Unger, 8 Iowa, 82 ... 362
Morris *v.* Rexford, 18 N. Y. 557 ... 318
——— *v.* Robinson, 3 Barn. & C. 196 ... 318
Morse *v.* Byam, 55 Mich. 598 ... 449
Mouat *v.* Fisher, 104 Mich. 262 ... 146
Mower's Appeal, 48 Mich. 441 ... 563, 564, 609
Muirhead *v.* Sands, 111 Mich. 487 ... 384
Murray *v.* Swanson, 18 Mont. 533 ... 283
Mutual Accident Ass'n *v.* Tuggle, 39 Ill. App. 509 ... 62
Myers *v.* Hinds, 110 Mich. 300 ... 676
——— *v.* Kalamazoo Buggy Co., 54 Mich. 215 ... 137

National Bank of Oshkosh *v.* National Bank of Ironwood, 100 Mich. 485 ... 103
Nellis *v.* Cramer, 86 Wis. 337 ... 576
Nester *v.* Ross' Estate, 98 Mich. 200 ... 80
New Orleans *v.* Houston, 119 U. S. 265 ... 206
Newton *v.* Principaal, 82 Mich. 271 ... 178
Nichols' Adm'r *v.* Railroad Co., 83 Va. 99 ... 27
North Carolina, etc., Ins. Co. *v.* Williams, 91 N. C. 69 ... 602
Norton *v.* Rockey, 46 Mich. 460 ... 521

O'Brien *v.* Insurance Co., 52 Mich. 131 ... 164, 169
O'Hare *v.* City of Dubuque, 22 Iowa, 144 ... 362
Olmstead *v.* Mattison, 45 Mich. 617 ... 306
O'Neil *v.* Railway Co., 101 Mich. 437 ... 27
——— *v.* Township of Deerfield, 86 Mich. 610 ... 10
Orcutt *v.* Bridge Co., 53 Me. 500 ... 99
Orth *v.* Featherly, 87 Mich. 319 ... 576, 577

Pacific R. Co. *v.* City of Leavenworth, 1 Dill. 393 ... 699
Palmer *v.* Dodd, 64 Mich. 474 ... 467
——— *v.* Railroad Co., 87 Mich. 281 ... 157
Patrick *v.* Howard, 47 Mich. 40 ... 393
Pattison *v.* Dryer, 98 Mich. 564 ... 187
Patton *v.* Chamberlain, 44 Mich. 5 ... 80, 439
Paul *v.* Insurance Co., 112 N. Y. 472 ... 62
Pearson *v.* Darrington, 32 Ala. 263 ... 394
Peaslee *v.* Collier, 83 Mich. 549 ... 180
Peninsular General Electric Co. *v.* Norris, 100 Mich. 496 ... 145
Pennock *v.* Coe, 23 How. 117, 131 ... 87
Pennoyer *v.* David, 8 Mich. 407 ... 490
Pennsylvania Co. *v.* Dean, 92 Ind. 459, 462 ... 118
Penny *v.* Croul, 76 Mich. 471 ... 80
People *v.* Alpin, 86 Mich. 393 ... 541
——— *v.* Barker, 60 Mich. 277 ... 541
——— *v.* Bechtel, 80 Mich. 630 ... 540
——— *v.* Bull, 46 N. Y. 57 ... 591
——— *v.* Bussell, 59 Mich. 110 ... 212
——— *v.* Cipperly, 101 N. Y. 634 ... 92
——— *v.* Everts, 112 Mich. 194 ... 541

Digitized by Google

PAGE
People *v.* Garey, 6 Cow. 642 ..... 591
——— *v.* Grand Rapids, etc., Plank Road Co., 67 Mich. 9 ..... 211
——— *v.* Gravel-Road Co., 105 Mich. 9 ..... 698, 699
——— *v.* Harty, 49 Mich. 490 ..... 84
——— *v.* Kerrigan, 73 Cal. 222 ..... 230
——— *v.* Oblaser, 104 Mich. 579 ..... 537
——— *v.* Murray, 89 Mich. 276, 290 ..... 229
——— *v.* Pitcher, 15 Mich. 397 ..... 538
——— *v.* Rice, 103 Mich. 350, 359 ..... 214
——— *v.* Roby, 52 Mich. 577 ..... 89–91
——— *v.* Silberwood, 110 Mich. 103 ..... 228
——— *v.* Swineford, 77 Mich. 582 ..... 180
——— *v.* Wayne Circuit Court, 11 Mich. 393, 404 ..... 79
——— *v.* Welch, 71 Mich. 548 ..... 90
——— *v.* Whipple, 108 Mich. 587 ..... 540
———, *ex rel.* Dickinson, *v.* Simondson, 25 Mich. 113 ..... 383
Perkins *v.* McDowell, 3 Wyo. 328 ..... 108
Perrin *v.* Lepper, 34 Mich. 292 ..... 449
Perry *v.* Lovejoy, 49 Mich. 529 ..... 172
Peters *v.* Ballistier, 3 Pick. 495 ..... 318
Petrie *v.* Lane, 58 Mich. 527 ..... 682
Phœnix Mut. Life Ins. Co. *v.* Holloway, 51 Conn. 310 ..... 600
Pierce *v.* Bryant, 5 Allen, 91 ..... 571
Pike *v.* Thomas, 62 Ark. 223 ..... 396
Pine Saw Logs *v.* Sias, 43 Mich. 358 ..... 666
Pinney *v.* Jones, 64 Conn. 545 ..... 507
Pistorius' Appeal, 53 Mich. 350 ..... 393
Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337 ..... 34
Pollock *v.* Mutual Accident Ass'n, 102 Pa. St. 230 ..... 61
Popendick *v.* Frobenius, 66 Mich. 317 ..... 439
Post *v.* Mason, 91 N. Y. 539 ..... 55
Potter *v.* McPherson, 21 Hun, 559 ..... 136
Pratt *v.* Montcalm Circuit Judge, 105 Mich. 499 ..... 150
Price *v.* Irrigating Co., 56 Cal. 431 ..... 221
Priestman *v.* U. S., 4 Dall. 28 ..... 37
Pzolla *v.* Railroad Co., 54 Mich. 273 ..... 532

Quincy Mining Co. *v.* Kitts, 42 Mich. 34 ..... 157

Randall *v.* Elwell, 52 N. Y. 521 ..... 36
——— *v.* Railway Co., 113 Mich. 115, 120 ..... 123
Rea *v.* Rea, 63 Mich. 257 ..... 621
Reading *v.* Waterman, 46 Mich. 109 ..... 449
Red Star Line Steamship Co. *v.* City of Jersey City, 45 N. J. Law, 246 ..... 220
Redmond *v.* Lumber Co., 96 Mich. 545 ..... 586
Remer *v.* McKay, 38 Fed. 164 ..... 454
Rex *v.* Inhabitants of West Riding, 7 East, 588 ..... 345
Rhode Island Hospital Trust Co. *v.* Commercial Nat. Bank, 14 R. I. 625 ..... 692
Rice *v.* Rice, 104 Mich. 371 ..... 172
Richards *v.* Richards, 75 Mich. 408 ..... 187
Richardson *v.* Hogg, 38 Pa. St. 153 ..... 572
——— *v.* McGoldrick, 43 Mich. 476 ..... 553
Rinear *v.* Railroad Co., 70 Mich. 620 ..... 126
Ripley *v.* Seligman, 88 Mich. 177 ..... 404

Digitized by Google

PAGE
Robert *v.* Morrin, 27 Mich. 306 ..... 180
Roberts *v.* Egerton, L. R. 9 Q. B. 494 ..... 92
——— *v.* Hawkins, 70 Mich. 566 ..... 579, 580
Robinson *v.* Charles Wright & Co., 94 Mich. 283 ..... 586
——— *v.* City of Detroit, 107 Mich. 168 ..... 495
Rockford, etc., R. Co., *ex parte*, 1 Low. 345 ..... 422
Rolf *v.* City of Greenville, 102 Mich. 544 ..... 381
Rooney *v.* Cordage Co., 161 Mass. 153 ..... 478
Ross *v.* Township of Ionia, 104 Mich. 320 ..... 300–302, 351
Roth *v.* Depot Co., 13 Wash. 525 ..... 27
Rouse, Hazard & Co. *v.* Detroit Cycle Co., 111 Mich. 251 ..... 574
Ruggles *v.* First Nat. Bank, 43 Mich. 196 ..... 244
Rushville Gas Co. *v.* City of Rushville, 121 Ind. 206 ..... 366
Russell *v.* Insurance Co., 80 Mich. 407 ..... 605
Russia Cement Co. *v.* Le Page, 147 Mass. 206 ..... 139

Sackett *v.* Spencer, 65 Pa. St. 89 ..... 439
Saddlesvene *v.* Arms, 32 How. Prac. 280 ..... 277
St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488 ..... 121
Sangamon, etc., R. Co. *v.* Morgan Co., 14 Ill. 163 ..... 37
Sanger *v.* Wood, 3 Johns. Ch. 416 ..... 318
Sanscrainte *v.* Torongo, 87 Mich. 69 ..... 190
Saunders *v.* Gallagher, 53 Minn. 422 ..... 554
Sayles, *in re*, 92 Mich. 354 ..... 617
Schaale *v.* Wasey, 70 Mich. 419 ..... 250
Schloss *v.* Feltus, 103 Mich. 525 ..... 174
Schmidt *v.* Bauer, 80 Cal. 565 ..... 27
Schneekloth *v.* Railway Co., 108 Mich. 1 ..... 485
Schofield *v.* Walker, 58 Mich. 96 ..... 405
School Directors *v.* Reddick, 77 Ill. 628 ..... 530
Schroedel *v.* Insurance Co., 158 Pa. St. 459 ..... 168
Schroeder *v.* Railroad Co., 103 Mich. 213 ..... 157
Schuffert *v.* Grote, 88 Mich. 650 ..... 404, 407
Schut *v.* Railway Co., 70 Mich. 433 ..... 126
Schwarzbach *v.* Protective Union, 25 W. Va. 622 ..... 654
Schwerin *v.* De Graff, 21 Minn. 354 ..... 554
Scott *v.* Bush, 26 Mich. 418 ..... 197
Scranton *v.* Wheeler, 6 C. C. A. 585, 57 Fed. 803 ..... 566
Seaman *v.* Whitehead, 78 N. Y. 309 ..... 394
——— *v.* Whitney, 24 Wend. 260 ..... 293
Seixo *v.* Provezende, 1 Ch. App. Cas. 192 ..... 137
Selleck *v.* Railway Co., 93 Mich. 380 ..... 299
Severance *v.* Severance, 90 Mich. 417 ..... 326
Sexton *v.* Amos, 39 Mich. 699 ..... 294
Seymour *v.* Rolling Mills, 56 Mich. 117 ..... 463
Shaw *v.* National State Bank, 49 Iowa, 179 ..... 436
——— *v.* Township of Saline, 113 Mich. 342 ..... 302, 379
Shearer *v.* Middleton, 88 Mich. 621 ..... 190
Sheldon *v.* Mann, 85 Mich. 265 ..... 103
Sheridan *v.* Cameron, 65 Mich. 680 ..... 145
——— *v.* City of Salem, 14 Or. 328 ..... 278
Sherman *v.* A. P. Cook Co., 98 Mich. 61 ..... 457
——— *v.* Gundlach, 37 Minn. 118 ..... 111
Shields *v.* Barrow, 17 How. 130 ..... 454
——— *v.* Sullivan, 3 Dem. 299 ..... 394, 395
Short *v.* Cure, 100 Mich. 420 ..... 553

Digitized by Google

PAGE
Shriver *v.* Bean, 112 Mich. 508 ..... 698, 699
Sibley *v.* Insurance Co., 57 Mich. 14 ..... 169
Simons *v.* Burnham, 102 Mich. 200 ..... 577
Simpson *v.* Hart, 1 Johns. Ch. 95 ..... 432
Sirrine *v.* Briggs, 31 Mich. 443 ..... 549
Sloan *v.* Holcomb, 29 Mich. 153 ..... 180
Small *v.* Marburg, 77 Md. 11 ..... 594
Smith *v.* Austin, 49 Mich. 286 ..... 400
——— *v.* Bell, 6 Pet. 68 ..... 692
——— *v.* Cuddy, 96 Mich. 562 ..... 413
——— *v.* Holland, 81 Mich. 476 ..... 294
——— *v.* Railroad Co., 95 Ky. 11 ..... 121
——— *v.* School District, 69 Mich. 589 ..... 530
——— *v.* Shelden, 35 Mich. 42 ..... 489
——— *v.* Simmons, 103 Pa. St. 32 ..... 613
——— *v.* Thompson, 94 Mich. 385 ..... 430
Snow *v.* Nowlin, 43 Mich. 383 ..... 129
Snyder *v.* Hemmingway, 47 Mich. 549 ..... 455
Sommers *v.* City of Marshfield, 90 Wis. 59 ..... 277
Soper *v.* Peck, 51 Mich. 563 ..... 178
Spaulding *v.* Insurance Co., 61 Me. 329 ..... 602
Spear *v.* Rood, 51 Mich. 140 ..... 271
Spears *v.* Chapman, 43 Mich. 541 ..... 294
Spokane St. Ry. Co. *v.* City of Spokane Falls, 46 Fed. 322 ..... 699
Springer *v.* City of Detroit, 102 Mich. 300 ..... 278
Spurck *v.* Leonard, 9 Ill. App. 174 ..... 489
Staats *v.* Ten Eyck's Ex'rs, 3 Caines, 115 ..... 341
Stagg *v.* Insurance Co., 10 Wall. 589 ..... 602
Stambaugh *v.* Snoblin, 32 Mich. 296 ..... 455
Stanley *v.* Railway Co., 101 Mich. 202 ..... 157
——— *v.* Schwalby, 162 U. S. 255 ..... 567
State *v.* Butte City Water Co., 18 Mont. 199 ..... 222
——— *v.* Campbell, 44 Wis. 529 ..... 211
——— *v.* City of Toledo, 48 Ohio St. 112 ..... 367
——— *v.* Friedley, 135 Ind. 119 ..... 591
——— *v.* Hartfiel, 24 Wis. 60 ..... 90
——— *v.* Ingersoll, 17 Wis. 631 ..... 211
——— *v.* Kelly, 54 Ohio St. 166 ..... 91
——— *v.* McDonald, 20 Minn. 136 ..... 212
——— *v.* Smith, 10 R. I. 260 ..... 91
——— *v.* Van Stralen, 45 Wis. 437 ..... 212
——— *v.* Webster, 30 Ark. 166 ..... 108
State Treasurer *v.* Somerville, etc., R. Co., 4 Dutch. 21 ..... 37
Staver & Abbott Manfg. Co. *v.* Blake, 111 Mich. 282 ..... 574
Stebbins *v.* Township of Keene, 55 Mich. 552 ..... 11, 280
——— *v.* ———, 60 Mich. 214 ..... 11
——— *v.* Wolf, 38 Kan. 765 ..... 341
Steel Brick Siding Co. *v.* Muskegon Machine & Foundry Co., 98 Mich. 616 ..... 150
Stevens *v.* City of Muskegon, 111 Mich. 72 ..... 613
——— *v.* Railroad Co., 31 Barb. 590 ..... 35, 36
Stickney *v.* City of Salem, 3 Allen, 374 ..... 99
Stone *v.* Dickinson, 5 Allen, 29 ..... 451
Stringham *v.* Winnebago Co. Supervisors, 24 Wis. 594 ..... 277
Strudgeon *v.* Village of Sand Beach, 107 Mich. 496 ..... 46
Studley *v.* Ann Arbor Savings Bank, 112 Mich. 181 ..... 336

Digitized by Google

PAGE
Sturgis *v.* Hendricks, 51 N. Y. 635 ..... 555
——— *v.* Railway Co., 72 Mich. 619 ..... 27
Stuyvesant *v.* Wilcox, 92 Mich. 228 ..... 413
Sullings *v.* Shakespeare, 46 Mich. 408 ..... 541
Sullivan *v.* Deiter, 86 Mich. 404 ..... 598
——— *v.* Ross' Estate, 98 Mich. 570 ..... 312, 315, 320
Sutfin *v.* People, 43 Mich. 37 ..... 84
Sweetzer *v.* Mead, 5 Mich. 110 ..... 306
Swift *v.* Railroad Co., 123 N. Y. 645 ..... 27

Tallcot *v.* Moore, 6 Hun, 106 ..... 136
Taylor *v.* Canal Co., 113 Pa. St. 162 ..... 27
Texas, etc., R. Co. *v.* Moody, (Tex. Civ. App.) 23 S. W. 41 ..... 119
Thielman *v.* Carr, 75 Ill. 385 ..... 150
Thomas *v.* Watt, 104 Mich. 201 ..... 474, 475
Thompson *v.* Howard, 31 Mich. 312 ..... 318
——— *v.* Percival, 5 Barn. & Adol. 925 ..... 233
Timm *v.* Railroad Co., 98 Mich. 226 ..... 157
Tindal *v.* Wesley, 167 U. S. 204 ..... 567
Tinkham *v.* Town of Stockbridge, 64 Vt. 480 ..... 345
Titus *v.* Mabee, 25 Ill. 257 ..... 37
Toan *v.* Pline, 60 Mich. 385 ..... 198
Todd *v.* Boards of Election Com'rs, 104 Mich. 478 ..... 671
Tolbert *v.* Burke, 89 Mich. 132 ..... 508
Toll *v.* Jerome, 101 Mich. 468 ..... 56
Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418 ..... 119
Towle *v.* Insurance Co., 91 Mich. 219 ..... 164, 446
Township of Medina *v.* Perkins, 48 Mich. 67 ..... 11, 280
Trade Ins. Co. *v.* Barracliff, 45 N. J. Law, 543 ..... 170
Travelers' Ins. Co. *v.* Dunlap, 160 Ill. 642 ..... 62
Tripp *v.* School District, 50 Wis. 651 ..... 529
Tucker *v.* Grace, 61 Ark. 410 ..... 396
Tunningly *v.* Butcher, 106 Mich. 35 ..... 417
Tuttle *v.* Strout, 7 Minn. 465 ..... 309

Union Central Life Ins. Co. *v.* Howell, 101 Mich. 332 ..... 178
Union Loan & Trust Co. *v.* Motor Road Co., 51 Fed. 850 ..... 37
Union Trust Co. *v.* Morrison, 125 U. S. 591 ..... 37
U. S. *v.* American Waterworks Co., 37 Fed. 747 ..... 220

Van Alstyne *v.* Dearborn, 2 Wend. 586 ..... 111
Vandike *v.* Rosskam, 67 Pa. St. 330 ..... 550
Vanhorn *v.* Corcoran, 127 Pa. St. 265 ..... 572
Vermont Farm-Machine Co. *v.* Marble, 20 Fed. 117 ..... 435
Vertrees' Adm'r *v.* Railway Co., 95 Ky. 314 ..... 121
Vilas *v.* Manufacturing Co., 91 Wis. 607 ..... 283

Waddington *v.* Buzby, 45 N. J. Eq. 173 ..... 55
Wagar *v.* Briscoe, 38 Mich. 587 ..... 145
——— *v.* Stone, 36 Mich. 364 ..... 225, 226
Waldron *v.* Laird, 65 Mich. 239 ..... 198
Walker *v.* Railroad Co., 49 Mich. 446 ..... 294
Walstrom *v.* Hopkins, 103 Pa. St. 118 ..... 234
Waring *v.* Insurance Co., 45 N. Y. 606 ..... 170
Warner *v.* Littlefield, 89 Mich. 329 ..... 103, 306
Warren *v.* Davis, 43 Ohio St. 447 ..... 278

Digitized by Google

PAGE

Watson *v.* Stever, 25 Mich. 386 ..... 638, 639
Watts *v.* Sweeney, 127 Ind. 116 ..... 454
Waydell *v.* Luer, 3 Denio, 410 ..... 233
Weatherbee *v.* Weatherbee, 20 Wis. 499 ..... 436
Webber *v.* Alderman, 102 Mich. 638 ..... 232
Wedderburn *v.* Wedderburn, 22 Beav. 84 ..... 267
Weirich *v.* Scribner, 44 Mich. 73 ..... 294
Western Electric Co. *v.* Hart, 103 Mich. 483 ..... 463
Wetter *v.* Walker, 62 Ga. 142 ..... 692
Wheeler *v.* Arnold, 30 Mich. 304 ..... 80, 320
Whitcher *v.* City of Somerville, 138 Mass. 455 ..... 345
Whitcomb *v.* Whitney, 24 Mich. 486 ..... 22
White *v.* Forbes, Walk. Ch. 114 ..... 614
——— *v.* Prior, 88 Mich. 647 ..... 114
——— *v.* Ross, 47 Mich. 172 ..... 171, 172
Whoram *v.* Township of Argentine, 112 Mich. 20 ..... 685
Wild *v.* Dean, 3 Allen, 579 ..... 233, 235
Wilder *v.* Railway Co., 70 Mich. 382 ..... 126
Will *v.* Village of Mendon, 108 Mich. 251 ..... 46
Willard *v.* Ames, 130 Ind. 351 ..... 186
Willer *v.* Bergenthal, 50 Wis. 474 ..... 150
Williams *v.* Ellis, 5 Q. B. Div. 175 ..... 679
——— *v.* Farrand, 88 Mich. 478 ..... 136, 137
Williamson *v.* Railroad Co., 29 N. J. Eq. 311 ..... 36
——— *v.* Williamson, 71 Me. 442 ..... 341
Wilson *v.* Bartholomew, 45 Mich. 41 ..... 70
——— *v.* Railway Co., 64 Ill. 542 ..... 211, 212
Winchester *v.* Craig, 33 Mich. 205 ..... 129
Wingert *v.* Wayne Circuit Judge, 101 Mich. 395 ..... 149
Winnebago Paper Mills *v.* Travis, 56 Minn. 480 ..... 581
Winslow *v.* Jenness, 64 Mich. 84 ..... 620
Wisner *v.* Mabley's Estate, 74 Mich. 143 ..... 608
Wolcott *v.* Judge of Superior Court, 112 Mich. 311 ..... 90
Wood *v.* City of Auburn, 87 Me. 287 ..... 221
——— *v.* McGrath, 150 Pa. St. 451 ..... 612
Woodman's Estate, *in re*, 151 Pa. St. 586 ..... 593
Woods *v.* Gaar, Scott & Co., 93 Mich. 143 ..... 129
——— *v.* Railway Co., 108 Mich. 396 ..... 589
Wright *v.* Pipe Line Co., 101 Pa. St. 204 ..... 240
Wylie *v.* Gamble, 95 Mich. 564 ..... 463

Yardley *v.* Cuthbertson, 108 Pa. St. 395 ..... 325
Young *v.* City of Boston, 104 Mass. 95 ..... 221

Zucker *v.* Karpeles, 88 Mich. 413 ..... 180



Digitized by Google

# LAWS CITED AND CONSTRUED.

## CONSTITUTION OF MICHIGAN.


| | PAGE |
|---|---|
| Art. vi. § 11 | 55 |
| Art. vi. § 17 | 591 |
| Art. vi. § 28 | 229 |
| Art. xvi. § 1 | 308, 309 |


## COMPILED LAWS.


| | PAGE |
|---|---|
| 1871, § 6263 | 225 |


## 1 HOWELL'S STATUTES.


| | PAGE | | PAGE |
|---|---|---|---|
| §§ 2, subd. 12 | 33 | §§ 3548 | 698 |
| 1473 *et seq.* | 641 | 3582 | 676 |
| 1476 | 641 | 3935 *et seq.* | 632 |
| 2274 | 89 | 3940 | 682 |
| 2344, 2346, 2348, 2349 | 571 | 4182 *et seq.* | 660 |
| 2352 | 572 | 4253 | 164 |
| 2355 | 574 | 4471 | 389 |
| 2853 | 344 | 4888 | 632 |


## 2 HOWELL'S STATUTES.


| | PAGE | | PAGE |
|---|---|---|---|
| §§ 5065 | 527 | §§ 7516 | 85 |
| 5155 | 528 | 7639–7642 | 208 |
| 5569 | 438, 439 | 7686, subd. 8 | 308, 309 |
| 5685 | 340 | 7770, 7771 | 415 |
| 5894 | 509 | 7789, subd. 2 | 621 |
| 5908, 5910 | 387 | 7847 | 225 |
| 5958 | 398 | 7957 | 180 |
| 5959 | 608 | 8024 | 637 |
| 6116 | 57 | 8040 | 71 |
| 6203 | 305, 625 | 8341 | 19 |
| 6576 | 642 | 8374 | 414, 415 |
| 6619 | 421 | 8707 | 456 |
| 6840 | 417 | 8730 | 14 |
| 7253 | 109 | 9015 | 608 |
| 7317 | 124 | | |


## 3 HOWELL'S STATUTES.


| | PAGE | | PAGE |
|---|---|---|---|
| §§ 1170*g*1 | 242 | §§ 7545 | 404 |
| 1717*a* | 308 | 7546 | 172 |
| 2283*d*1 | 90 | 7546*a* | 368 |
| 3208*a*3 | 290 | 7836 | 436 |
| 3208*a*8 | 286, 289 | 8427*e*, 8427*f*, 8427*m* | 665 |
| 3718*h* | 389 | 8698 | 189 |
| 5932 | 669 | 8749*m* | 616 |
| 6841 | 416 | 9191*a* | 210 |




Digitized by Google

## SESSION LAWS.


| | PAGE |
|---|---|
| 1869, Act 243 | 216 |
| —— ——§§ 6, 10, 13, 14, 24 | 217 |
| 1871, Act 243 | 611 |
| 1881, Act 113, § 13 | 642 |
| —— Act 168 | 389 |
| 1883, Act 129, § 8 | 389 |
| 1885, Act 14, § 1 | 308, 309 |
| —— Act 296 (Local), chap. 15, § 2 | 276 |
| 1887, Act 229 | 112 |
| 1889, Act 171 | 357 |
| —— Act 195, § 62 | 242, 244 |
| —— ——§§ 64, 66 | 243 |
| —— Act 304 (Local) | 247 |
| 1891, Act 102 | 641 |
| —— Act 179, § 4 | 492 |
| —— ——§ 9, subd. 3 | 283 |
| —— ——§§ 10, 27 | 149 |
| —— Act 186 | 361, 364 |
| 1893, Act 139 | 364 |
| —— Act 199, § 1 | 492 |
| —— ——§ 6 | 283 |
| —— Act 206 | 382 |
| 1893, Act 206, § 7, subd. 4 | 389, 390 |
| —— ——§ 14, subd. 1 | 184 |
| —— ——subd. 8 | 182, 183 |
| —— ——§ 24 | 183 |
| —— ——§ 47 | 32 |
| —— ——§ 66 | 383 |
| —— ——§ 99 | 246 |
| —— Act 408 (Local), § 18 | 229 |
| 1895, Act 41 | 364 |
| —— Act 51 | 210 |
| —— Act 116 | 542 |
| —— Act 152 | 55 |
| —— Act 193, §§ 1–3 | 87 |
| —— ——§ 8 | 89 |
| —— ——§ 19 | 87 |
| —— Act 215 | 590 |
| —— Act 229 | 32 |
| —— Act 353 (Local) | 687 |
| —— Act 366 (Local), § 4 | 495 |
| —— Act 444 (Local), tit. 8, § 10, subd. 39 | 642 |
| 1897, Act 11 | 670 |


## JOINT RESOLUTION.


| | PAGE |
|---|---|
| 1895, No. 17 | 541 |


## CIRCUIT COURT RULE.


| | PAGE |
|---|---|
| No. 47, par. (e) | 535 |


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## GEORGE VAN NESS LOTHROP.

At the opening of court on Tuesday, November 3, 1897, Mr. JAMES H. POUND presented to the court the following memorial, adopted by the Detroit bar on the death of the Honorable GEORGE VAN NESS LOTHROP:

The bar of Detroit have learned with profound sorrow of the death of their distinguished leader, GEORGE VAN NESS LOTHROP.

Mr. LOTHROP was born at Easton, Mass., August 8, 1817. He graduated at Brown university in 1838. After studying at the Harvard law school, he came to Michigan in 1841, and has resided here ever since. His success was assured from the start. He easily rose to recognized leadership of the bar of the State, and maintained it to the close of his professional career, 12 years ago, when, at the call of President CLEVELAND, he accepted the post of minister to Russia, amid the enthusiastic plaudits of his fellow-citizens, regardless of party affiliations.

His legal knowledge was wide and accurate. He was equally well versed in common law, equity, and admiralty. His legal instincts were keen and almost inerrant. His power to apply his knowledge to a case in hand was exceptionally great. He was most extraordinarily gifted as an orator. His mind was saturated with the spirit of the classics. His imagination was rich and chaste; its manifestation always consonant with perfect taste. He was of magnificent presence. His great personal dignity was always tempered by a most gracious manner and uniform courtesy that never, under any circumstances, failed him.

Ardently devoted to and proud of his profession, he yet found time to serve the public in many ways. He was the recorder of the city of Detroit, the attorney general of the State from 1848 to 1851, and a member of the Consti-



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tutional Convention in 1867. When he accepted the Russian mission he was one of the commissioners of the public library. He was much attached to the political party with which he had always been allied, and was many times its choice for governor, member of congress, and United States senator. On these occasions Mr. LOTHROP led a forlorn hope with all the courage of his convictions. He represented his party in the Charleston convention in 1860, and there won renown by his eloquence and labors.

Mr. LOTHROP was not only great as a lawyer and politician, in the best sense of that much-abused word; he was great as a citizen. Whenever there was occasion to give expression to the public mind, all men instinctively turned to him as their spokesman. How well he acquitted himself on such occasions, none but those who heard him will ever realize. In the simplicity of his life he exemplified the rarest virtues of American citizenship.

But he has gone from us. He breathed his last at his late residence in this city on the forenoon of Monday, the 12th day of July, 1897. Of what was once a great and beneficent presence in our midst, there remains to us a fragrant memory.

*Resolved*, that these expressions of the bar be presented to the federal courts of this circuit, to the Supreme Court of this State, to the circuit court for the county of Wayne, and to the recorder's court of Detroit; and that the secretary be directed to send a copy to the family of the deceased.

OTTO KIRCHNER,
WM. A. MOORE,
HENRY H. SWAN,
SIDNEY D. MILLER,
LEVI T. GRIFFIN,
S. M. CUTCHEON,
HENRY M. DUFFIELD,
JAMES H. POUND,
JAMES V. D. WILLCOX,
JOHN D. CONELY.

*Detroit*, July 13, 1897.

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Mr. POUND spoke as follows:

*Your Honors:*

I am commissioned by the bar of Detroit to present to this court a memorial and well-deserved eulogy, adopted by them upon the occasion of the death of their respected and able leader, Mr. G. V. N. LOTHROP; and I am instructed to ask this court to order the same inscribed upon its records, and published in its reports, as a just tribute to a very able, eloquent, worthy, and highly-honored member of the bar of this State.

It may not be inappropriate at this time to offer a few observations upon the life and career of this great man, who came to us of this generation as a rich legacy from a preceding one. Mr. LOTHROP appeared as one of the counsel of the Supreme Court of this State as early as the January term, 1844, as he himself tells us in his admirable address to this court found in the first part of the 51st Michigan Report. And true it is that, from 1844 to 1885, no counsel appeared more frequently before this court and its predecessors, in this State, than did Mr. LOTHROP, and none in their practice had the good fortune to have a wider field of professional labor and examination presented to them than was assigned to him,—professional trusts which he exhausted by his research, his painstaking, plodding, patient investigation, and thorough and brilliant discussion of the themes he was engaged in. And it is believed that no counsel of that imposing array of great men who flourished with Mr. LOTHROP in the beginning of this State's history, and who did so much to mould the affairs of this State upon safe and correct lines, did more than he to aid this court in winning the reputation it possesses of having written opinions, deciding causes, which, for lucidity, erudition, intellectual strength, and polished culture, in the application of the rules of law to the manifold and diverse interests of mankind, are in many instances not surpassed by the most profound and best-written judgments of Westminster Hall itself,—judgments which are the equal of the best thought of the highest judicial forums known to civilized man.

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Mr. LOTHROP, as is well known to the bench and bar of Michigan, was an indefatigable worker. Never did man, so abundantly supplied by nature with that subtle essence known as "genius," less rely upon it alone for success in his efforts, either in the courts or before his countrymen in his public addresses. Neither was there a man who relied more strongly upon patient, constant, plodding toil, and careful and intelligent preparation. And still no man could have more safely relied upon natural gifts. He possessed great intellectual powers, exceptional in the breadth and profundity of their grasp, united to an eloquent and silvery tongue, that, by its very music, charmed its hearers almost to conviction before the intellect, with abundant powers of persuasion, had scarcely more than begun to make an effort to convince its auditors. Mr. LOTHROP enjoyed in plenitude that attribute of the greatest orators, the love of the multitude, who hung spellbound upon his lips; but, more to his credit, be it said that he never made an ignoble or a paltry use of his glorious powers, and that he ever had the commending admiration of the able jurists who adorned this court during the period he practiced before them.

Mr. LOTHROP, although recognizing that the law is a jealous mistress, still spared time from an active professional life to perform his duty as he saw it as a public-spirited citizen. He was ever a true friend of the public school system of this State, and displayed his political courage in this respect by his position upon the question of the distribution of the public school funds, when that question was before the people of the city of Detroit. He then helped to inaugurate, and led, an independent political movement, which was entirely successful, having for its object the preservation of the school system as now known to us, without religious assistance in the distribution of the funds raised by public taxation, and thereby securing their absolute secularity in the broadest sense. At other times he maintained his reputation for political

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independence by action apart from party in his endeavors to defeat unworthy nominations for judicial power. Mr. LOTHROP, during the Rebellion, pursued the course of a patriotic citizen. The well-beloved of the political school he affiliated with, he ardently believed in but one country and one flag, and was willing, if necessary to secure it, to sink all partisan wishes in an earnest opposition to sectional violence.

Mr. LOTHROP, during the decades running from 1860 to 1880, was in such demand in important causes in this State that his services were solicited, and he participated, it is believed, in nearly every case of great magnitude arising within the boundaries of this State during that period, to his own ever-broadening fame and honor.

A man of superb presence and physique, of kindly and genial disposition, the soul of integrity and honor; a simple man, an old-school gentleman, in the full sense of that term. A man whose statement of a fact was so fair and truthful and candid that it carried conviction, frequently in preference to testimony. A lawyer who loved his State, and who, although a practitioner in all courts, wooed most assiduously his mistress, and won his greatest victories, in the forums of his adopted State. One, too, who had the wisdom to retire forever from forensic efforts 12 years before his death, and before his abilities became in any wise enfeebled or impaired; who, after reflecting credit and dignity upon his State by his discharge of the Russian embassy, returned to his home to pass his twilight days in undiminished intellectual vigor, surrounded by his books, family, and friends, passing philosophically away the few remaining days allotted to him.

Mr. LOTHROP, although solicited, could not be tempted from his seclusion, after his formal retirement from the bar upon his acceptance of the Russian mission, to the struggle of the forum, and contentions with younger men. He realized he had indeed finished his work, and purposely passed his last years in philosophic contemplation of the stage upon which he himself had played so impor-

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tant a part. He seemed to remain as a majestic oak in its decline, awaiting, with majesty, its upheaval by some mighty storm,—waiting, with a quiet dignity and composure, the blow that must inevitably come. The blow has fallen, and, in the fullness of his years, G. V. N. LOTHROP has passed away. But it is conceived that such a character, such a man, and such an example of the quiet and unassuming, yet capable and competent, American citizen, should not be allowed to pass away without emphatic attention being called to the value of his pure and blameless life, as a model to the State, for its citizens, and for this State's youthhood.

It is believed that the study of Mr. LOTHROP'S life will be particularly striking, and should be used to kindle and stimulate in the breasts of the younger members of our profession the lesson that no honor excels the able and complete discharge of the duties of private citizenship, and the exertion of the talents of industry in the performance of the duties imposed by an honorable profession; that no honor exceeds the thorough performance of life's duties, as shown by the life of this exalted and most praiseworthy man.

He was a man who was qualified to fill any position in the State or Nation, whether as a representative to a foreign court from the Nation, or in discharging the duties of the important office of attorney general, which he filled in this State in the meridian of his life,—the one particular officer of the law in this State who is the effective instrument of this court in the initiating of public business, and whose duty it is to prompt this court for good in the conservation of the public laws, and the highest position in the gift of the State a mere advocate should desire; a position, it is believed, more potential for good to the citizens of the Commonwealth than probably any other position in the gift of the profession Mr. LOTHROP so long and ably adorned.

Mr. LOTHROP was a thorough lawyer, a polished and eloquent orator, a courteous officer of this court, and a

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former State official of high trust, whose every duty in every walk of life he discharged with fidelity, and the most steadfast purpose of doing right. He was a credit and an honor to Michigan. I ask his recognition by the granting of this motion.

---

Chief Justice LONG responded as follows:

The members of this court are glad to receive the resolutions adopted by the Detroit bar upon the occasion of the death of the Honorable GEORGE V. N. LOTHROP, recognizing as we do that the tribute paid by them to the memory of their distinguished associate, in the resolutions themselves and in the remarks of their representative who presents them, is in no respect extravagant or undeserved. Indeed, the legal fraternity of the entire State, every advocate and every judge, will indorse it, and will feel that the action of the Detroit bar is a suitable and seasonable expression of their own sentiments with respect to the deceased.

In speaking for the court upon this occasion, I am privileged to represent not alone my associates, but, in a sense, all those who have preceded us in these judicial positions since the organization of the court; for it should not be forgotten that each and every one has personally enjoyed the acquaintance and friendship of Mr. LOTHROP. During the 40 years which preceded his retirement from active practice, he appeared here as counsel in a multitude of causes, in the conduct of which he displayed, in each instance, zeal for his client and thoughtfulness for the court. The volumes of the reports which cover this interesting period will ever remain a substantial evidence of his industry, his integrity, and his ability; for no man who lacked any of these characteristics could have maintained for so many years a position of such pre-eminence at the bar of the court of last resort. It is fitting that these resolutions and remarks should be made a part of the records of this court, and the clerk will be directed accordingly.

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## JUSTICES MORSE AND McGRATH.

At the opening of court on Tuesday, April 5, 1898, being the first day of the term, oil portraits of the Honorable ALLEN B. MORSE and of the Honorable JOHN W. McGRATH, former justices of the court, were presented to the court, on behalf of the bar of the State, by the Honorable JOHN W. CHAMPLIN and the Honorable GEORGE H. DURAND, respectively, also ex-members of the court.

Mr. CHAMPLIN spoke as follows:

*May it Please your Honors:*

I have the honor, as well as the pleasure, of presenting to this court a portrait of one who was formerly one of its members, and chief justice.

Judge MORSE is still among us, engaged in the practice of the profession of which he is so fond. This is not a time for pronouncing a eulogy or panegyric upon his life and character. To do so would be contrary to his wishes, as well as a violation of the proprieties of the occasion.

ALLEN BENTON MORSE was born at Otisco, Mich., January 7, 1839. His youthful years were spent upon his father's farm. His education was acquired mostly in the public schools of his town. He took a two years' course at the Agricultural college, near Lansing, where he finished his education, and in 1860 began the study of the law. He pursued his studies until the southern states plunged into open rebellion and resistance to the laws of the United States. His country called for volunteers, and he enlisted as a private in the 16th Michigan infantry in 1861. In 1863 he was transferred to the 21st infantry, which was recruited and rendezvoused at Ionia, and which went to the front in the Western department. Soon after the battle of Chickamauga, he was assigned



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to duty as acting assistant adjutant-general on the staff of Col. F. T. SHERMAN, who commanded the 1st brigade of Sheridan's division. While acting in this capacity he lost his left arm at the battle of Missionary Ridge. He left the service in 1864, and returned to Ionia, and entered again upon the study of the law, and was admitted to practice in February, 1865. He was elected to the office of prosecuting attorney of Ionia county for two terms, which he filled with ability and success. After his term of office expired, and during the succeeding years, he was professionally engaged in the defense of many important criminal suits, and built up a reputation as a successful lawyer. He was elected to the senate of the State of Michigan for 1875, and served upon several important committees. His reputation and ability as a lawyer brought him the nomination for justice of the Supreme Court, to which office he was elected in the spring of 1885. The resignation of Chief Justice COOLEY in October of that year caused a vacancy in the court, and Judge MORSE was appointed to fill it, and he entered upon the duties of chief justice in October, 1885. Thus he commenced and ended his judicial career as chief justice of this court. While upon the bench, in 1891, he was the recipient of the honorary degree of LL. D., conferred upon him by the Agricultural college, through its board of trustees, as a testimonial of their regard for his great judicial ability.

As an associate of Judge MORSE upon the bench, I can certify to his unfailing industry and untiring zeal to get at the pith of the controversy, without favor or prejudice toward either of the parties litigant. He was quick to seize upon the decisive points involved, and to determine them upon reason and authority. He did not adopt blindly the decisions of other courts, but investigated the reasoning upon which the cases were decided; and if it appeared to be sound, or commended itself to his judgment, he would rely upon it as strengthening his position. It sometimes occurred, as it will occur in the administra-

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tion of justice, owing to the different mental capacities of different men thinking upon the same subject, that a decision of our own court, previously announced, would not meet with the approval of his convictions; that he would be inclined to differ from the decision expressed by his predecessors; but regarding the question as settled, and giving weight to the maxim of *stare decisis*, he would forego his dissent, and be ruled by what had been established as the law in this State. This was especially so when the decision had been of so long standing as might reasonably be presumed to have become a rule of property. He recognized that the certainty of a rule is often of more importance than the reason of it. He did not yield blind obedience to decisions which were contrary to principle, for to do so would be to perpetuate a wrong and render it immortal.

The first published opinion of Judge MORSE is found in the 58th Michigan Report, at page 220. The case involved the constitutionality of Act No. 320 of the Public Acts of 1885, which provided for the appointment of inspectors of election from two of the leading political parties. It was a concurring opinion with Mr. Justice CAMPBELL, in which he stated his own reasons for declaring the act unconstitutional. His work on the bench is evidenced in the published opinions of the court from volume 58 to volume 93. He resigned the office of chief justice October 1, 1892, and resumed the practice of the law. The year following he was appointed consul to Glasgow. His guiding principles in the administration of justice while upon the bench were right, justice, law; and these principles are apparent in all of the decisions he made. He was bold and fearless in announcing his convictions. He "hewed to the line, let the chips fall where they would."

In an association of more than six years with Judge MORSE upon the bench, I was enabled to form a just estimate of his judicial character. I found him attentive, careful, and conservative, and remarkably free from bias. His aim was to accomplish just results between parties

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litigant, in accordance with the law as disclosed by the record. I feel a just pride in presenting to this court, on behalf of the bar of this State, his portrait, and request that it be accorded a place upon the wall of this court-room as a commemoration of his services in the jurisprudence of this State.

Mr. DURAND said:

*May it Please the Court:*

When the distinguished sons of a State are honored, the State is honored. The glory of a State is in its people; and when those to whom power has been confided have performed their functions in so able a manner as to add luster to its history, the first human impulse is in some way to express appreciation of the work and character of such as have been unusually prominent in advancing and preserving the rights and liberties of the people, and the general prosperity and stability of the State. While in our own day and country we do not crown our living men with laurel, and lead them out to receive the ostentatious adulation of the public, yet we may modestly say something of their lives, and point them out as men who have been true and faithful to the trusts that have been reposed in them. It is not fair that all the pride we feel in our honored countrymen should remain unspoken until the history of their intellectual achievements is written on the monuments erected over their graves. It is quite commendable that a portion of the recognition to which an honored fellow-citizen is entitled should be bestowed in his lifetime, so that he may have the satisfaction of knowing, while he yet lives, that the story of his life is one in which his State takes a laudable pride, and that his life-work is being pointed to as worthy the emulation of those who are fitting themselves to assume the honors and take up the burdens which he has so faithfully carried.

Animated by this feeling of admiration and affection for a distinguished citizen of Michigan, the bar of the State has honored me with a commission to present to you

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this very perfect portrait of Judge JOHN W. MCGRATH, late the chief justice of this honorable court, and to ask that it be given a place on these walls.

Judge MCGRATH began his education upon the farm,—that wonderful school of nature from which have been graduated so many of the world's greatest jurists, statesmen, and soldiers. He learned to love labor and respect the laborer. He became so impressed with the dignity and importance of this basic principle of all true progress that it became a part of himself, and he has never forgotten to appreciate the wants and espouse the cause of those who earn their bread by honest toil. His subsequent development in college and university only served to give more perfect expression to that which he had learned in forest and field. His extensive intercourse with the world and with men in high station has never made him ashamed to recall his early home in the wilderness, nor to diminish his love and respect for those sturdy pioneers who directed his boyhood ambitions toward the goal which leads to success and fame.

He has held various positions of public trust, and, in the performance of his duties, displayed such qualities of ability and integrity as to impress the people with his real worth, and they in turn exalted him to the greatest honor that can be given a lawyer, by electing him as one of the judges of this court. Here, as elsewhere, he showed himself a man of much ability and untiring energy, as well as studious, aggressive, and forceful. What prejudices he may have had he kept well in control. His sympathies were always alert, and his heart was not hardened, nor his ears closed to the just complaints of either the rich or the poor.

Those of us who have had the pleasure of sitting with him on this bench know how ably and conscientiously he performed his high judicial functions. He was affable, patient, quick to perceive the salient points in a case, and apt in applying the law to them. He gave to each case his best thought. He was exhaustive in his research, and

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came to the consultation room fortified with authorities to sustain his contention, and with clearly-defined views of the principles which he thought should obtain. He was courteous to the bar, and listened with respectful attention to the arguments of counsel for contending litigants. He was considerate of the feelings of his brethren on the bench, and, however he might differ from them as to the conclusions that should be arrived at in a case at bar, yet he had their unqualified respect because of the able and fearless way in which he maintained his own views.

The reported opinions written by him portray his character and attainments more faithfully than either friend or foe can picture them. They show his ability, his learning, his knowledge of the world and its affairs, his untiring industry, his close application to the study of the law, and, above and beyond all, they bear abundant testimony of that high regard for the rights and liberties of the citizen which characterizes him as a just and upright judge. They constitute a record to which we and the generations which will come after us may always turn with the proud satisfaction of knowing that at least he did not lower the high standing which is accredited to the recorded enunciations of this court.

He is yet at the zenith of his manhood, and I have said all, and undoubtedly much more than he would wish me to say; but I could not say less, and express a fair judgment of his true manliness and worth. I am sure that you fully concur in my estimate of his character, and that, in granting the request we have made, you will gladly join with us in wishing for him many more years of usefulness and accumulating honors.

---

Chief Justice GRANT responded as follows:

*Gentlemen of the Bar:*

It gives me exceeding pleasure to accept, on behalf of my associates and of the State, the portraits of Justices MORSE and MCGRATH, which you have presented. In accepting them we heartily indorse what you have said in

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regard to their character, and the eminent services which they rendered in their official capacity to the State. Except my brother Justice MOORE, we were all associated with these gentlemen on the bench and in the consulting room. We there came to know them intimately, and formed friendships which will be life-long. They brought to their judicial work ability and learning, and were animated with the sole desire to reach the right, justice, and law of the cases brought before them for determination. It is well to hang upon the walls of this room, in lasting form, the faces of those who have been engaged in the difficult task of interpreting statutes, deciding constitutional questions, and applying those principles of the common law designed for the protection of the rights of citizens. All will recognize the difficulty in speaking of them, while they are living, as we would like to. I will therefore say no more than to voice the sentiments of my associates and myself by saying we are glad to receive these portraits, and to order them to be hung upon the walls of the court-room.

I wish also to say that we rejoice that steps are being taken to obtain the portraits of some of the earlier justices of this court which we do not possess. I refer to those who were judges prior to the organization of the court under the Constitution of 1850. Two of them are still living,—Judge SANFORD M. GREEN and Judge JOSIAH TURNER. Provision has already been made to secure a portrait of Judge GREEN, who is now over 90 years of age. We understand also that efforts are being made to secure one of Judge TURNER and of the late Judge DOUGLASS.

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# APRIL TERM, 1897.*

## ZIMMERMAN *v.* DETROIT SULPHITE FIBRE CO.

1. MASTER AND SERVANT—SAFE PLACE—EVIDENCE—QUESTION FOR JURY.

In an action by a mill employé for injuries sustained while oiling an overhead shaft, the plaintiff's witnesses testified that the platform on which the oiler stood was about seven feet above the floor, and consisted of a single plank 10 or 12 inches wide, supported on brackets placed at different heights and angles, so that it was inclined, and "wobbled" when in use. Defendant's witnesses testified that there were two boards, and that they were placed horizontally. *Held*, that there was evidence upon which the jury might find that the employer was negligent in the construction of the platform.

2. SAME—INSTRUCTIONS.

The court should have eliminated from the consideration of the jury all questions of negligence based upon the alleged dangerous proximity of the platform to revolving belts, and upon the alleged insufficient light, no tangible evidence having been presented by plaintiff to sustain either of these theories.

3. TRIAL—JURY—SPECIAL QUESTIONS—CONDUCT OF COUNSEL.

The defendant in an action for personal injuries, wherein the issue was alleged negligence in the construction of a platform, submitted a special question for the jury as to whether the plaintiff was hurt because he was knocked off the platform by a belt. This the court modified by adding the words, "and without other cause." The jury found a general verdict for the plaintiff, but answered the special question in the affirmative. Thereupon plaintiff's attorney discussed, in the presence of the jury, the probability of their having misunderstood the question, and asked the court to ascertain in regard thereto. The court declined to interrogate them, and discharged them from the case, but immediately thereafter

*Continued from Vol. 112.

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permitted counsel to poll them as to the special question. Upon the poll a juror stated that he believed the question was not put to them with the words added by the court, and that the answer returned was therefore not his verdict. The jury were again sent out, and upon their return answered the question in the negative. *Held*, that it was error to permit the discussion in the presence of the jury, and then to recall them after they had been discharged, and send them back to reconsider their verdict.

Error to Wayne; Hosmer, J. Submitted April 7, 1897. Decided May 25, 1897.

Case by Johann Zimmerman against the Detroit Sulphite Fibre Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff had been for six and a half years employed as a laborer in the defendant's mill, and had done various kinds of work, including the oiling of machinery. In the mill was a pump situated in a well about four or five feet square, and four feet below the floor. This pump was operated by a belt running in an upright position over a wheel attached to a horizontal shaft. The shaft was about 12 feet above the floor. It was necessary to oil the shaft directly above the pump once or more each day. About seven feet above the floor was a platform, on which the oiler stood while oiling the shaft. The distance from the platform to the place of oiling is five feet. Early one Monday morning, plaintiff was directed by the foreman of the mill to oil this shaft. The platform was reached by a stepladder, though sometimes it was reached by climbing up a post. Two brackets were placed to hold the platform. Below one of the brackets was an iron steam pipe, upon which it is claimed one end of the platform rested. Plaintiff had reached the platform, and, while in the act of oiling, fell into the well, and was injured. The negligence alleged is that the defendant did not provide a proper platform; that it was not securely fastened, so that it would not be shaken by the belt playing near it;

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that it was not wide enough; that it was on an angle; that it was not kept free from oil and water; that the room was not sufficiently light; that the platform was placed so near the belt that it would strike one standing on it; that plaintiff was unskilled and ignorant of the work to be done; and that he was directed to go upon this unsafe platform without instruction how to do the work or any apprisal of the danger. The manner of the accident is described as follows:

"While standing upon said platform, without any fault on his part, plaintiff was suddenly struck by the play of the moving belt, and, as the said platform was wet and greasy and slippery, he slipped, lost his footing, and was hurled to the bottom of the well beneath the platform."

No one saw the plaintiff while going upon the platform or when he fell. Plaintiff testified that he had never oiled this shaft before, and was ignorant of the condition of the platform; that the platform consisted of one plank 10 or 12 inches wide, and 12 or 13 feet long; that one end was lower than the other; that he thought one end was 4 or 5 feet high, and the other 7 or 8 feet high; that he thought there was a little oil on it; that it was a little slippery. His testimony as to the manner of the accident is as follows:

"I tried to reach the belt, and put oil on it (on the shaft), but the belt reached somewhere,—my body or clothes,—and throwed me down. The belt was between the planks where I fell down."

On cross-examination he said:

"I had not oiled the pump. I got catched some way or other, and fell down. The plank was slippery. I don't know whether it was oil or grease. I don't know how big the slippery place was. It was very slippery, but I have not seen how much it was from oil, etc. My feet slipped down, you know, suddenly. I fell into the hole. My leg first got the accident, on account of the slippery part, and the belt got the next. I slipped first. It was dark, and I was not able to see the spot where I

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slipped. I have not seen, because it was dark, whether it was oil or grease on the plank, and I don't know which it was. * * * I wanted to oil, but I slipped on the belt when the belt catched me, and I fell down."

He further testified:

"Mr. Ginsley, the foreman, told me to oil everything that was necessary, and he showed me how to do it before he put me at it. He showed me this pump. I have done this myself. He told me to do the oiling, everything that was necessary, and so I did it."

One other witness for the plaintiff, Nelson Richards, testified that there was one plank; that one end might have been 10 or 12 inches higher than the other.

"One end tipped. It was not on a square level. The steam pipe kind of ran down this way, and the board was square at this end, and the board laid on that. And the plank was not fastened in these places; it was loose, and we used to shove it around when we went to get up by the pulleys to put on the belts. It wobbled in its place, and was always wet and oily."

On cross-examination this witness testified:

"I have been on this platform to help put on belts, and I never had any trouble standing on it. The mill did not run Sundays, and the planks would not be wet Monday morning before the mill started, unless from steam. There was no steam in that part of the mill Sundays, but there is when we start up. * * * There is a large skylight there on one side from the pump, and I never had any trouble in seeing when there, and I had no trouble when I got up on this plank to see to put on the belts."

The testimony on the part of defendant was to the effect that this platform consisted of two planks placed horizontally upon the brackets; that the place was sufficiently light; and that the platform had been in daily use for two years without accident.

Plaintiff recovered verdict and judgment.

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*De Forest Paine*, for appellant.

*Louis J. Siemon* (*Alfred Lucking*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). It is insisted on behalf of defendant that no negligence was shown, and that the court should have so instructed the jury. It is also urged that the danger, if any there was, was apparent to the plaintiff, and that, therefore, he assumed the risk. A third contention is that, if the plaintiff stood so near the belt as to be struck by it, this was his own negligence, since there was room for him to stand without touching it.

The case is not free from difficulty. The evident theory of the declaration is that he was struck by the belt while standing upon the platform, and that this caused him to slip; and it was urged on behalf of defendant that the case made by the proofs is not the one set out in the declaration. The court, by his instructions, eliminated from the consideration of the jury the slippery condition of the platform in consequence of grease and steam, holding that these were not elements of negligence. The sole ground of negligence submitted to them was the construction of the platform. Upon this point we are unable to say that there was no testimony tending to show negligence. It is true that several witnesses, who had long been familiar with this platform, and had used it constantly, testified that it consisted of two planks placed horizontally, and that the place was well lighted. Under this testimony, there was no negligence on the part of the defendant. Qn the contrary, there were two witnesses who testified that it consisted of a single plank, placed at an incline, and one support at a different angle from the other. If this was so, it could not be called a safe place. We must therefore hold that there was such a conflict of evidence as will not justify us in reversing the judgment on the ground that there was no evidence of negligence.

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The plaintiff's own testimony, upon which alone he can recover, leaves the cause of the accident doubtful. It is difficult to determine whether the belt struck him first, or whether he slipped, and fell against the belt. It is equally difficult to determine upon which theory the jury based their verdict. If it was upon the theory that the belt struck him first, the verdict cannot be sustained, because there was no evidence to show that the platform was too near the belt, or that there was negligence in so constructing it. It was necessary to oil the shaft. The oiler must in some way be able to reach the part to be oiled. No suggestion is made that any better or safer instrumentality than the platform could have been employed. There is no tangible evidence that it was so dark that the plaintiff could not see the belt, or that the shaft could not have been oiled with safety while standing upon the platform. It had been thus safely done for two years. This element of negligence should therefore have been eliminated from the consideration of the jury. It is quite probable that the jury made this the basis of their verdict, because it is alleged in the declaration as negligence, and also it is there alleged that the play of the moving belt struck him, and caused him to slip upon the slippery and greasy platform. If the platform was properly constructed, and plaintiff slipped in consequence of the oil or water upon it, there could have been no recovery. He had reached the platform in safety, and stood engaged in the act of oiling when he fell. Unless he fell by reason of the incline in the plank, or the fact that the supports were uneven, in consequence of which the plank tipped, he was not entitled to recover. These were the sole conditions that made the place dangerous.

At the conclusion of the evidence, counsel for defendant requested that the following special questions should be submitted to the jury:

"If the platform was not on a level, by diligence could the plaintiff see it?

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"If it was not securely fastened, would he know it when he got on it?

"Was the plaintiff hurt because he slipped off the platform?

"Was he hurt because he was knocked off the platform by the belt?"

At the conclusion of the charge, these questions were fully explained to the jury by the court. Then, after further discussion by the counsel, the court, in his own handwriting, added to the third and fourth questions the words, "and without other cause." The jury returned into court with a general verdict for the plaintiff, and the first three questions answered "No," and the last "Yes." The following colloquy then took place:

"*Mr. Lucking:* If the court please, my query is with regard to the fourth question. You instructed the jury in one part of the charge that the plaintiff could not recover unless the platform was at fault.

"*Mr. Paine:* I object to any discussion in the presence of the jury.

"*Mr. Lucking:* I ask the court to ask the jury with regard to the fourth question.

"*The Court:* I decline to ask the jury anything with reference to that. You may poll the jury or not, just as you see fit.

"*Mr. Lucking:* It is all in the discretion of the court to determine whether they have thoroughly understood the fourth question.

"*Mr. Paine:* I object to the discussion and to the remarks of counsel.

"*Mr. Lucking:* We do not want any claptrap or any catch by anybody.

"*The Court:* I never had such a contingency arise before me exactly.

"*Mr. Paine:* I wish to make a remark, and have it taken down, that the jury are present during the counsel's remarks to the court.

"*Mr. Lucking:* I ask your honor to poll the jury on the fourth question.

"*The Court:* The court will do nothing of the kind. You may ask that the jury be polled as to any part of the verdict you see fit.

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"*Mr. Lucking:* As to the fourth question, I want your honor to satisfy yourself that there has been no misunderstanding on the part of the jury. Now, the court does not sit here to aid counsel in trapping one side or the other. The court wants to know that the jury thoroughly understand their verdict.

"*Mr. Paine:* I wish it to appear that the counsel stands with the special questions answered in his hand, making these remarks to the judge.

"*Mr. Lucking:* I ask your honor to know positively that the jury have understood this in the same sense that the court does.

"*The Court:* You may poll the jury if you desire to poll them. I will say nothing to the jury other than what I have said,—other than the charge.

"*Mr. Paine:* I object to the court's ruling, after the remarks of the counsel in the presence of the jury, that he may poll the jury.

"*Mr. Lucking:* I ask the court to ask the jurors in connection with that question 4,—to explain question 4, and ask them if that is what they meant by it.

"*The Court:* That I decline to do. Gentlemen of the jury, you may be discharged from further consideration of the case.

"*Mr. Lucking:* I have asked that they be polled with reference to question 4, and also the other questions.

"*The Court:* The poll may be put, the jury being still here. You may poll the jury in that respect."

Upon the poll of the jury, eight answered "Yes" after the question was put to them as amended by the court and as actually submitted. The ninth juror said: "I don't think that was read as you have read it there. It is in another handwriting. I did not observe the other words." *Question:* "Then it is not your verdict?" *Answer:* "No, sir." The jury were then sent back to the jury room, and after a while returned, answering the fourth question "No."

It seems impossible to believe that the jurors did not understand the question. The last words of the judge were upon this subject, and were clear and explicit. They had no difficulty in understanding the third question, with the words added. The fourth question was in exact accord

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with the allegations and theory of the declaration. In view of the character of the testimony and the claim in the declaration, we are inclined to hold that it was error to permit the discussion in the presence of the jury, and then to recall them after being discharged, and send them back to reconsider it. *Brassel* v. *Railway Co.*, 101 Mich. 11.

For this error the judgment must be reversed, and a new trial ordered.

Other errors are assigned, but, as they are not likely to arise on a new trial, we need not discuss them.

The other Justices concurred.

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## ABEN v. TOWNSHIP OF ECORSE.

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TOWNSHIPS — DEFECTIVE BRIDGE — NOTICE—EVIDENCE — QUESTION FOR JURY.

Plaintiff, while riding upon a traction engine, sustained injuries by reason of the collapse of a bridge, due to the decay of the stringers, which had been in use for 15 years. In an action against the township, persons who lived near the bridge testified that it had been in bad condition for some time; that it would shake when teams passed over it; and that they were afraid to drive across it with heavy loads. One witness testified that he had gone upon the bridge with the overseer of highways, and that it shook when they jumped upon it. This witness was contradicted by the overseer. The commissioner of highways testified that he went under the bridge two months before the accident, and made a careful examination, without finding any evidence of decay. *Held*, that there was evidence to go to the jury on the question of notice.

Error to Wayne; Carpenter, J. Submitted April 7, 1897. Decided May 25, 1897.

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Case by William Aben against the township of Ecorse for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

*William Look* and *Harry F. Chipman*, for appellant.

*Samuel W. Burroughs* and *Ari E. Woodruff*, for appellee.

MOORE, J. Plaintiff brought this suit to recover for injuries received by him while riding upon a traction engine which fell through a defective bridge. The defect consisted in the decay of the ends of the stringers. It was the contention of the township that plaintiff failed to show any notice of the defect on the part of the township. The trial judge accepted the view urged by the defendant, basing his opinion upon *O'Neil* v. *Township of Deerfield*, 86 Mich. 610, and directed a verdict in its favor. In the light of the accident, there is no question raised about the bridge being defective. The only question involved is, was there evidence proper to go to the jury bearing upon the question of notice to the township?

The accident occurred August 6, 1894. Louis Aben testified that, a short time before the day of the accident, the highway commissioner told him he had tested the bridge, and that it was sound. Charles Voss testified that the bridge was just in front of his house; that the bridge was in bad condition; that it would shake when a wagon went across it; that, in June before the accident, he informed the overseer of highways that the bridge was in bad condition; that they went on the bridge together, and jumped upon it, and it shook. He afterwards qualified his testimony as to when this occurred by saying he could not tell whether it was in March, April, May, June, or July. Annie Theeck testified that she lived near the bridge; that it was an old bridge ever since she knew; that she saw the engine coming, and she and her sister went out to see the bridge shake when the

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engine passed over it; that she had seen it shake before when teams passed over it. Mathias Raupp swore that he was highway commissioner in 1879, and built the bridge that year; that he saw the stringers after the accident, and identified them as the stringers he put into the bridge. Mrs. Theeck testified that she lived near the bridge, and had for 27 or 28 years; that the stringers were rotten; that the bridge would always shake when a wagon passed over it; that it had been in that condition for nearly two years; that, in June before the accident, she saw the highway commissioner there examining the bridge; that she had driven over the bridge nearly every day before the accident with a loaded wagon, and did not think it would break down. Henry Ritter swore that he lived about a mile from the bridge; that he drove over the bridge with loads in safety, but that he put on small loads, because he was afraid it would break down; that, before the engine went over, he thought the bridge would break down if they went over it with a heavy load. The overseer of highways denied the testimony of Mr. Voss. The commissioner of highways testified that he was under the bridge in June, previous to the accident, to examine the bridge, to see whether it was safe; that he made a careful examination of it, and came to the conclusion that it was safe for reasonable travel, in the ordinary use of such bridges; that he could not, from anything he could discern with the eye, looking at it and examining it, see any evidence of decay. A great deal of testimony was given tending to show that the accident occurred because the engine was driven on one side of the bridge.

We think there was sufficient testimony in the case bearing upon the question of notice so that the case should have been submitted to the jury. See *Township of Medina* v. *Perkins*, 48 Mich. 67; *Stebbins* v. *Township of Keene*, 55 Mich. 552, 60 Mich. 214; *Moore* v. *Township of Kenockee*, 75 Mich. 332; *Malloy* v. *Township of Walker*, 77 Mich. 448, 464; *Blank* v. *Township of*

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*Livonia*, 95 Mich. 229; *La Duke* v. *Township of Exeter*, 97 Mich. 450 (37 Am. St. Rep. 357).

Judgment is reversed, and new trial ordered.

LONG, C. J., MONTGOMERY and HOOKER, JJ., concurred with MOORE, J. GRANT, J., concurred in the result.

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## PATTERSON *v.* COLLIER.

LIMITATION OF ACTIONS — BILLS AND NOTES — PART PAYMENT — AGENCY.

The stockholders of a corporation, who join in executing a promissory note for its accommodation, do not, even though it is understood that the corporation shall pay the note, thereby constitute it their agent to make payments upon the indebtedness, so that such payments will arrest the running of the statute of limitations in their favor.

Error to Oakland; Moore, J. Submitted April 7, 1897. Decided May 25, 1897.

*Assumpsit* by John W. Patterson and another against Charles F. Collier, George E. Pomeroy, and others, upon a promissory note. From a judgment for all the defendants except George E. Pomeroy, on verdict directed by the court, plaintiffs bring error. Affirmed.

*Aug. C. Baldwin* and *Edward J. Bissell*, for appellants.

*John H. Patterson*, *Charles F. Collier*, *in pro. per.*, and *Clarence Tinker*, for appellees.

HOOKER, J. The defendants were stockholders in a corporation known as the Holly Vinegar & Preserving

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Company; defendant Pomeroy being president, and defendant Wilson being secretary, of the concern. In June, 1884, this corporation needed some money, and a conference was had by these defendants with one Seeley, who refused to loan it upon the credit of the company, but consented to furnish it upon the paper of the stockholders; and on June 21st these defendants made their joint note, payable to Daniel Seeley or bearer, for $1,000, payable in one year, with interest at 8 per cent., and obtained $1,000, which was paid over to the vinegar works. Two or three payments were made upon this note by the Holly Vinegar & Preserving Company; one of them being made by or through defendant Pomeroy, against whom the plaintiffs were allowed to recover. It is perhaps inferable that these payments were made with the knowledge of the defendants, and that it was the arrangement, made when the money was borrowed, that the company should pay the note. The defense interposed is the statute of limitations, and the only question is whether the case is taken out of the statute by these payments.

Counsel for the plaintiffs contend that the Holly Vinegar & Preserving Company was made the agent of the defendants to pay this note, and, therefore, that the payments were made on their behalf and by their consent. On the other hand, the defendants insist that the payments were not made for them, or upon their behalf, or by the use of their funds. It is manifest that all parties knew that this was accommodation paper, and that payments made by the vinegar company were made on its own behalf, upon an obligation that it was morally bound to pay, and that the defendants wished and expected it to pay. There is nothing in this that ought to be construed into authority to pledge the defendants' credit. If the case is taken out of the statute by such payment, it is by reason of a technical application of the doctrine of agency. Had the vinegar company signed the note with the defendants, such payment would not have had such effect, under our statute and the decisions

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of this court. 2 How. Stat. § 8730. The actual relation of the parties was substantially the same as though the vinegar company had joined in the note. There is nothing in the case that shows that the defendants intended to give the company authority to extend this note beyond the statutory period, and we think the case is within the rule of the case of *Home Life Ins. Co.* v. *Elwell*, 111 Mich. 689, and cases there cited.

The judgment of the circuit court is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. MOORE, J., did not sit.

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## RENTCHLER *v.* LAWTON.

CONTRACTS—CONSTRUCTION—HOMESTEAD RIGHTS.

A written contract provided that S., in consideration of the sum of $225, would convey certain lots to L.; that L. should erect a dwelling house upon one of the lots, for which S. would furnish the lumber and do the mason work; and that L. should purchase the lots, and pay for them, and for the labor and material, in the manner thereinafter provided. By a further provision, S. was to deliver to L., when the house should be completed, a statement of labor and materials furnished by him, the full amount whereof should, when agreed upon, with the $225 for the lots, be filled into "the annexed land contract," which should then be executed by the parties. No time for the payment or conveyance was otherwise provided. *Held*, that L. acquired no homestead rights by virtue of his possession under such contract, it amounting merely to an agreement between the parties that, in case certain conditions should be performed, a contract of sale would be made on terms to be agreed upon.

Appeal from Washtenaw; Kinne, J. Submitted April 9, 1897. Decided May 25, 1897.

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Bill by Mathias Rentchler against Milton S. Lawton and others to enforce a mechanic's lien. From a decree for complainant, defendants appeal. Affirmed.

*Lawrence & Butterfield*, for complainant.

*Frank E. Jones*, for defendants.

LONG, C. J. This is a bill to enforce a mechanic's lien. It appears that on the 19th day of January, 1894, the defendant Conrad Schafer was the owner of two lots in the village of Saline. On that day he entered into a contract in writing with the defendant Lawton. In the first paragraph of this contract it was agreed that Schafer, in consideration of the sum of $225, would sell and convey to Lawton the two lots mentioned. No time was set for the payment or the conveyance. It was further provided in the agreement that Lawton at once, upon the execution thereof, would "enter upon the work of erecting a dwelling house" upon the lots, or one of them, make excavation therefor, and draw, deliver, and furnish the stone to be used in the cellar wall and foundation, also the sand, gravel, and lime, at such times as they would be needed; that he would furnish and deliver all hardware, trimmings for doors and windows, and do all the carpenter work, tin work, and roofing, all the painting, and keep the house insured for the benefit of Schafer. Schafer was to do the mason work, and furnish the lumber. It was further agreed that Lawton would purchase the two lots, and pay for the said lands, and all other sums due for labor and material, "in the way and manner hereinafter provided for and agreed upon." It was then agreed that, when the house should be completed, Schafer should deliver to Lawton a statement of all labor and material furnished by him, and that the full amount thereof, when agreed upon, with the $225 for the lots, should "be filled into the annexed land contract, which shall at that time, and after the said amount shall be filled in, be executed and acknowledged in duplicate by the parties hereto."

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This agreement was signed by Schafer and Lawton, and a land contract for the sale of said lots, with the amount of the money consideration left blank, was drawn up and attached, but never executed. There is nothing in the record to show that the complainant ever saw this contract, or knew of its provisions. He was told by Lawton that he had bought the lots, and complainant made an agreement with Lawton to do the carpenter work in connection with the house for $150. He began the work on the 5th day of April, 1894, and finished it October 3d following, also performing $20 worth of extra work, which has been fully paid for, as has also about $5 on the contract price, leaving $145 now due. Defendant Lawton, with his wife, moved into the house in July, 1894, and remained there until some time in the following February, at which time he moved away, and left Saline, and has surrendered all his rights under the contract with Schafer. The defendant Schafer then moved into the house, and resided there at the time of the hearing, having sold the other lot for $100. The market value of the house and lot as they now stand is $1,000. Complainant brought suit to recover his pay for the carpenter work done on the house. The court entered decree in favor of complainant for the amount claimed,—$145. Defendants appeal.

The defendants' contention is that the property is the homestead of defendant Lawton and wife, or was at the time the lien attached, and that, the contract not being in writing, and signed by the wife, the lien cannot be enforced. This contention cannot be sustained. The Lawtons never had any such interest in the property that a homestead interest could be based upon it. The contract made with Schafer was an agreement simply that, when certain conditions were performed, a contract would be made upon terms to be agreed upon. No further discussion is necessary.

The decree of the court below must be affirmed, with costs.

The other Justices concurred.

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## BYRNES v. PALMER.

1. FIXTURES—MORTGAGOR AND MORTGAGEE—EVIDENCE.
Defendant erected a building on mortgaged premises owned by him, and, after default, deeded the property to plaintiff, the mortgagee, in satisfaction of the mortgage, taking back a lease for one year, with an option to purchase. Within the year he removed the building to other land owned solely by him, and, in replevin by plaintiff, claimed that the building was erected for partnership purposes by a firm of which he was a member, and was to be removable at their option. Plaintiff testified that defendant assured her, when the deed was given, that the building would become her property, and that he had first tried to borrow more money because of the additional security. There was also testimony that defendant had made contradictory statements with respect to his reasons for removing the building. *Held*, that the evidence raised a question for the jury as to whether the building was personal property, as claimed by defendant, or was in fact a fixture.

2. REPLEVIN—DAMAGES—COSTS.
Under 2 How. Stat. § 8341, providing that in actions of replevin the jury shall, if they find for the plaintiff, assess the damages for the unlawful taking and detention, the expense of replacing a building wrongfully removed is properly included in the verdict, and is not a part of the taxable costs.

3. EVIDENCE—HARMLESS ERROR.
The exclusion of evidence as to the rental value of property, upon an issue as to its value, is not reversible error, where the witnesses whose answers are excluded are permitted to testify to the actual value.

Error to Muskegon; Russell, J. Submitted April 9, 1897. Decided May 25, 1897.

Replevin by Matilda E. Byrnes against George G. Palmer. From a judgment for plaintiff, defendant brings error. Affirmed.



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*Arthur Jones*, for appellant.

*Chamberlain & Cross*, for appellee.

MONTGOMERY, J. Plaintiff sued in an action of replevin to recover a building which had been constructed upon the west two-thirds of lot 2, block 122, Durkee's addition to Muskegon, and which had been moved off the land by the defendant. On July 22, 1891, defendant was the owner of the land, and on that day executed a mortgage to plaintiff to secure the payment of $600 and interest in three years from date. There were two dwelling houses on the lot at this time, and subsequently the building in question was erected. The defendant having defaulted in payment, on the 29th of May, 1895, an arrangement was made by which the defendant deeded the land to plaintiff in satisfaction of the mortgage, and she gave him back a lease for one year, with an option to purchase within that time. Plaintiff testified that, before taking the deed, defendant had endeavored to borrow more money of her, stating that the improvement on the property, including the barn or building in question, made the property good security. She also testified that defendant told her, at the time the deed was given, that the barn was hers. She further testified that, after defendant had removed the building, she demanded an explanation of why he removed her barn from the lot, and he replied that he did not deed the lot to her, but deeded the lot belonging to his next-door neighbor. This testimony was corroborated by plaintiff's husband and others. This testimony is disputed by defendant. He testified that the building was erected by himself and his brother as a carpenter shop, and that it belonged to the firm, and was constructed for a carpenter shop, to be used there, or removed, if their business demanded it. He also testified that he bought the lot upon which he moved the building. The plaintiff recovered a verdict, and defendant brings error.

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The chief contention of defendant's counsel is that a verdict should have been directed for defendant on the ground that it conclusively appeared that the building was not attached to the soil, and that it was erected with the intention that it should remain personal property. The trial judge did charge the jury that if the building was erected by, and was the property of, Palmer Bros., the plaintiff could not recover. We are of the opinion that the court was right in refusing to withdraw the question from the jury. The statements of defendant were wholly inconsistent with the claim now put forth, and the facts that the building was first erected on land owned solely by defendant, and, when removed, was removed to land wholly owned by him, were of some significance. We think it was proper to permit the jury to determine the truth or falsity of defendant's claim.

Plaintiff was permitted to recover, as a part of her damages, the expense of replacing the building on her lot. This is complained of. We think the trial judge was clearly right. 2 How. Stat. § 8341, provides that on recovery by plaintiff the same jury shall assess the damages which he has sustained by the unlawful taking and detention, or by the unlawful detention, of the property. Surely the plaintiff suffered damages by the taking of her building from her property to another part of the town. It is suggested that this charge was properly a part of the taxable costs, but we know of no authority for the officer to do more than deliver the building to plaintiff. If the building had been removed from plaintiff's premises in another county, it would not be contended that the officer might, under his writ, deliver it on the property from which it was taken.

Error is assigned on the refusal of the court to permit evidence of the rental value of the property. It is not contended that this was admissible, except for its bearing on the value of the property; and, as the same witnesses by whom the rental value was sought to be established testified to the value of the property, it is not apparent that

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defendant was injured by the ruling, even if the testimony was technically admissible, particularly as the testimony of value itself had but a remote bearing on the question at issue.

Some criticism is made upon the charge of the court, but we think the charge, as a whole, presented the questions involved fairly.

The judgment is affirmed.

The other Justices concurred.

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BRUNDAGE *v.* SHELLY.

TRIAL—INSTRUCTIONS.

Failure to give a specific request is not error if the subject-matter is fully and carefully covered in the general charge.

Error to Wayne; Aldrich, J., presiding. Submitted April 9, 1897. Decided May 25, 1897.

Replevin by Samuel L. Brundage and others against Sumner P. Shelly and others. From a judgment for plaintiffs, defendants bring error. Affirmed.

*T. E. Tarsney*, for appellants.

*Bowen, Douglas & Whiting*, for appellees.

MOORE, J. This is an action of replevin for a quantity of sawlogs which the plaintiffs claimed defendants wrongfully took from them. The logs were not delivered to the plaintiffs on the writ of replevin. Upon the trial the plaintiffs recovered judgment for the value of the logs. Defendants appeal.

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The questions involved are almost wholly questions of fact. It was the claim of plaintiffs that they sold the logs in question to one Morrow for $9.25 a thousand feet, $7.50 of which was to be paid when the logs were scaled on the banks of the Cunard river, in Canada, and the balance when the logs were delivered at Shelly & Robertson's mill, at Wyandotte, the title of the property to remain in the plaintiffs until paid for. It was their claim that they brought the logs in controversy over to near Shelly & Robertson's mill before any payment was made upon the logs, because it served their convenience to do so at the time, and tied the logs up above the boom of Shelly & Robertson, and notified the foreman of Shelly & Robertson that he must not interfere with the logs until the plaintiffs were paid; that one night after that the logs were taken and put in Shelly & Robertson's boom. It was the defendants' claim that these logs were bought by them from Morrow, who was to buy logs on the banks of the Cunard river, which were to be measured by Shelly & Robertson on the bank, who were to pay him $7.50 a thousand feet, their mark to be put upon the logs, and the title to be in Shelly & Robertson as soon as the logs were scaled. It is their claim that, prior to the time these logs were delivered, Mr. Shelly had a talk with Samuel L. Brundage, in which he was told the terms of the contract between Shelly & Robertson and Morrow, and that Brundage was told the plaintiffs must notify Shelly & Robertson if Morrow did not pay, and he said all right, they would go on and get out the logs, and give Shelly notice if Morrow did not pay; that no notice was received from plaintiffs. Defendants claimed that the scale for the logs was received October 31st; that defendants waited until November 5th, when $1,200 was sent to Morrow to pay for the logs in question; and that the title passed to the defendants. Testimony was given tending to support the several theories of the parties litigant.

It is the claim of counsel for appellants that the title to the logs passed to defendants under the holding in *Whit-*

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*comb* v. *Whitney*, 24 Mich. 486. We think this cannot be said to be true as a matter of law. If the contention of the plaintiffs was true, the title to the logs was not to pass until the plaintiffs were paid for them, and it was for the jury to say which version was true.

Error is assigned because of the failure of the trial judge to give certain requests to charge. While the trial judge did not give all of the requests of counsel, he covered the subject fully and carefully in his general charge. The case was properly submitted to the jury, who accepted the plaintiffs' version of the transaction.

The assignments of error have all had consideration, but they do not call for further discussion.

Judgment is affirmed.

The other Justices concurred.

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WESHGYL *v.* SCHICK.

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ADVERSE POSSESSION—COTENANTS.

To make possession adverse as against a cotenant, notice of the hostile claim must be clearly brought home to him.

Error to Berrien; Coolidge, J. Submitted April 7, 1897. Decided May 25, 1897.

Ejectment by Frank Weshgyl against Frederick Schick and Caroline Schick. From a judgment for plaintiff, defendants bring error. Affirmed.

*James O'Hara*, for appellants.

*N. A. Hamilton*, for appellee.

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MONTGOMERY, J. This is an action of ejectment, and a companion case to *Beck* v. *Schick*, 110 Mich. 665. Christof Schick died intestate, seised of the lands in question, February 21, 1875, leaving a widow, a son (the defendant Frederick), a married daughter, and a grandson, the plaintiff, who was at the time 10 years of age. The defendant continued to reside on the premises, and plaintiff remained as a member of his family until May, 1888, when he left. In January, 1896, he brought this action to recover the undivided one-third of the land. The defense was adverse possession. It was also sought to show, by the testimony of defendant himself, that a parol gift of the land was made to him many years ago by his father. This testimony was clearly incompetent. The undisputed testimony, then, in the case, shows that the plaintiff was the owner of the undivided one-third from the death of his grandfather, and that he attained his majority in 1885. Defendant claims that he was ousted at an earlier date, by having notice brought home to him that he (defendant) claimed the entire property. The court charged the jury that the fact that the defendant himself occupied the place would not be sufficient to constitute adverse possession, and that, in case of a cotenancy, the mere holding of possession for 15 years would not be sufficient notice to a cotenant of a claim to the whole. But he further charged the jury that, if the boy was distinctly notified,—if he was notified in such shape that he must have known that his uncle (the defendant) was claiming to own the land absolutely,—his adverse possession would begin to run, and that, in order that the defendant should acquire title, there must have been 15 years' possession after this notice was given to plaintiff, and left it to the jury to determine whether that period of 15 years had run or not. We think this instruction sufficiently favorable to defendant, and that it fairly covered the law of the case.

Some exceptions are preferred to the refusal of the court to give instructions as to the abstract nature of the plaintiff's rights, and whether, at the common law, there

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was a right of inheritance. These instructions could have been no possible aid to the jury in determining the simple question involved in this case.

There was no error committed on the trial, and the judgment will be affirmed.

The other Justices concurred

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CLARK *v.* MICHIGAN CENTRAL RAILROAD CO.

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RAILROAD COMPANIES—TRESPASSERS—LIABILITY FOR INJURIES.

A railroad company is not liable for injuries to a trespasser or bare licensee resulting from his falling over a semaphore wire while crossing the right of way of the company.

Error to Washtenaw; Kinne, J. Submitted April 9, 1897. Decided May 25, 1897.

Case by George V. Clark against the Michigan Central Railroad Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*Lehman Bros.*, for appellant.

*John F. Lawrence*, for appellee.

HOOKER, J. Main street, in the village of Chelsea, runs north and south, and crosses the defendant's six tracks at an angle of about 25 degrees. The freight and passenger houses are south of the tracks; the former being a few rods west, and the latter about the same distance east, of Main street. On the north side of the railroad tracks is a driveway extending from Main street westerly, parallel with the tracks, between which and the tracks are three buildings. The first is Wood's ware-

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house, and is situated but a few feet from Main street; next is Kempf's warehouse, which stands farther west, but in close proximity to Wood's warehouse; and a little farther west is a building called an "oil house." The driveway gives access to all of these buildings upon the north, and the track is close to them upon the south. There is a sidewalk on the west side of Main street. The first street to the north of the tracks is North street, which is parallel with the track, and it is apparent that persons living upon that street west of Main street find the distance to the business portion of the town shorter by going in a direct line across the tracks than by taking the highway running northeast to Main street, and then south; and, the station grounds being unfenced, people are in the habit of walking upon and across them at will. There is no evidence indicating an invitation or license unless it be found in the fact that the defendant has taken no steps to prevent it. The accompanying diagram will aid in understanding the situation. The line A-B C-D, between the second and third tracks (counting from the north), represents a wire which is used to operate, from the station, a semaphore, some distance off. This wire is raised some eight or ten inches from the ground, being supported at short intervals upon rollers or pulleys, and is drawn taut. Witnesses differ about the size of the wire, stating it to be from one-eighth inch to the size of the finger. One says it is a twisted wire; others that there were two wires. On the occasion of the injury, the plaintiff started from Kempf's warehouse, where he had delivered some poultry, to go to Kempf's bank to get a check for the chickens. Instead of going by the highway with his son, who drove the team, he took a more direct route across the tracks, thinking to save a little time, and was tripped by the wire, and hurt his elbow. The circuit court directed a verdict for the defendant, and the plaintiff has appealed.

Counsel for the plaintiff make the claim that the common practice of crossing the unfenced grounds of the de-

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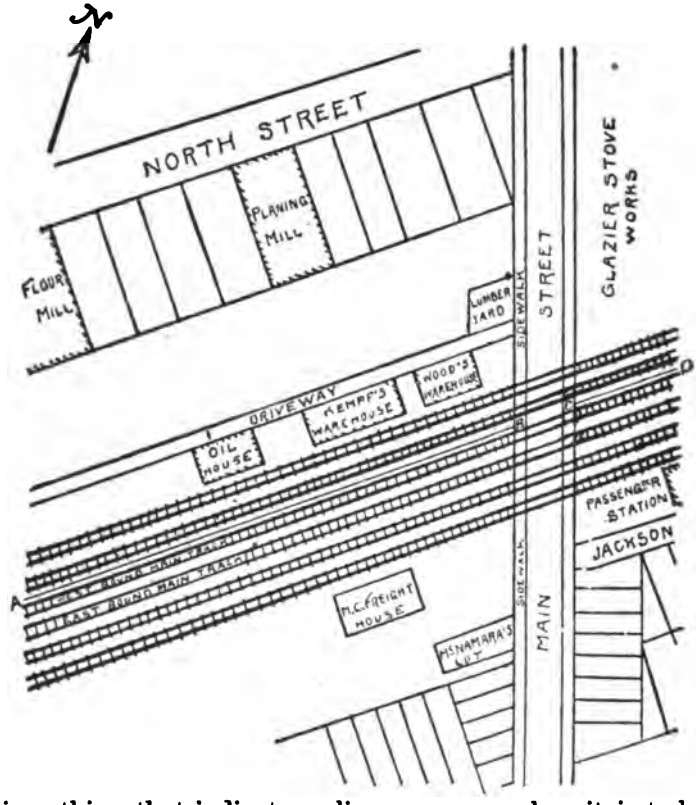
fendant at this point for over 20 years had established a public easement, but they cite no authority which sustains the contention. In our opinion, the evidence does not create a suspicion of the existence of an easement. There




is nothing that indicates a license even, unless it is to be inferred from the fact that the defendant did not care to contest the right of every person whose convenience might lead him to cross the premises. Technically, such people were trespassers; but it is not to the discredit of the defendant that it did not resort to violence or litigation to stop a practice that did it no harm. Whether these persons were trespassers or naked and gratuitous licensees (which last we do not mean to intimate) is un-

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important. In neither case had they the right to expect the defendant to forego a reasonable use of its land, in which respect it stood on the same plane as a private person. Such persons may have rights of action where a wanton injury is done them, or where caused by unlawful acts, and, under some circumstances, in the running of trains, as in the following cases cited by counsel: *Barry* v. *Railroad Co.*, 92 N. Y. 289 (44 Am. Rep. 377); *Byrne* v. *Railroad Co.*, 104 N. Y. 362 (58 Am. Rep. 512); *Taylor* v. *Canal Co.*, 113 Pa. St. 162; *Nichols' Adm'r* v. *Railroad Co.*, 83 Va. 99; *Swift* v. *Railroad Co.*, 123 N. Y. 645; *Hooker* v. *Railway Co.*, 76 Wis. 542; *Roth* v. *Depot Co.*, 13 Wash. 525. See, also, *Green* v. *Railway Co.*, 110 Mich. 648. It is the general rule that one who enters the private grounds of another at the mere license of the latter does so subject to the attendant risks. See *Schmidt* v. *Bauer*, 80 Cal. 565, 5 L. R. A. 580. With the latter report of this case will be found a note citing many cases in support of the doctrine. And see 1 Thomp. Neg. 303, and *Kinney* v. *Onsted*, *post*. In our own State are two cases which clearly forbid a recovery: *Sturgis* v. *Railway Co.*, 72 Mich. 619; *O'Neil* v. *Railway Co.*, 101 Mich. 437. In the light of these cases, the defendant was entirely without fault.

The judgment is affirmed.

The other Justices concurred.

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MINER *v.* RAYMOND.

ESTATES OF DECEDENTS—COMPROMISE WITH MORTGAGEE—POWER OF ADMINISTRATOR.

The holder of a promissory note given by an intestate in his lifetime, and secured by a mortgage on realty, is liable to the estate for the repayment of interest moneys paid to him by the administrator out of the personal estate to induce him to defer sale under a decree of foreclosure, although the agreement was made in good faith, since an administrator has no authority to part with any portion of the estate in payment of a claim not regularly proved before the commissioners.

Case made from Jackson; Peck, J. Submitted April 9, 1897. Decided May 25, 1897.

*Assumpsit* by John W. Miner, administrator *de bonis non* of the estate of Isaac C. Quick, deceased, against Mahlon H. Raymond, to recover unauthorized payments by the former administrator. Defendant died pending the trial, and the cause was revived in the name of his executrix, Jane E. Raymond. Plaintiff had judgment on verdict directed by the court, and defendant assigns error. Affirmed.

*Melville McGee* and *Parkinson & Campbell*, for appellant.

*Grove H. Wolcott*, for appellee.

LONG, C. J. Isaac C. Quick, in his lifetime, gave defendant's testator his promissory note for $4,000, due in two years, with interest at 6 per cent., payable annually. To secure the payment thereof, Quick and wife gave Raymond a mortgage on their farm. Afterwards Quick died intestate, and Augustus O. Quick was appointed administrator of his estate. Raymond foreclosed his mortgage in chancery, and the decree provided for a sale at any time after the 30th day of January, 1893. In order

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to induce Raymond not to sell under his decree, Augustus O. Quick agreed to pay him the back interest on the note and mortgage and costs of the foreclosure suit. Raymond agreed to defer the sale at the request of Quick on his promise to pay the interest and costs, and further agreed that he would postpone the sale so long as Quick would keep the yearly interest paid, and not permit the land to run down. Out of the personal property belonging to the Quick estate and the crops raised on the real estate, Augustus O. Quick paid to Raymond, under said agreement, the sum of $631.44. This action was brought to recover back this amount.

Augustus O. Quick resigned, and filed his account. On the final hearing thereof the judge of probate determined that there remained in Quick's hands $47.07 in money unadministered, and a few articles of personal property. The probate judge also at the hearing disallowed items of disbursements in Quick's account to the amount of $1,238.85, which sum included the payment made to Raymond of $631.44. Afterwards John W. Miner, the appellee, was appointed administrator *de bonis non* of the estate of Isaac C. Quick, deceased, and prosecuted this action to recover the amount paid to Raymond by Quick. The court below held that he could maintain this action, and directed verdict for plaintiff. It is conceded that all the parties acted in good faith, that Raymond withheld his sale, and Quick retained possession, hoping to save the farm to the estate, and for that purpose entered into the agreement with Raymond, which agreement Raymond fulfilled on his part.

We think the court was not in error in directing the verdict under the facts stated. A creditor, secured or unsecured, cannot receive from the administrator any portion of the estate in payment of a claim until such claim is regularly proved. *Fish* v. *Morse*, 8 Mich. 34; *Clark* v. *Davis*, 32 Mich. 154. It appeared that commissioners on claims had been appointed, but Mr. Raymond did not present his note and mortgage for allowance as a

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claim against the estate. He was apparently satisfied with his mortgage security. He received the payment from Quick without any authority of law, and was liable therefor in this action.

The judgment must be affirmed.

The other Justices concurred.

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CHICAGO & NORTHWESTERN RAILWAY CO. *v.* ELLSON.

1. RAILROAD COMPANIES—TAXATION—CONSTRUCTION OF STATUTES.
Section 47 of Act No. 206, Pub. Acts 1893, as amended by Act No. 229, Pub. Acts 1895, provides: "If any person shall neglect to pay any tax assessed to him, the township treasurer shall collect the same by seizing the personal property of such person, * * * from which seizure no property shall be exempt." 1 How. Stat. § 2, subd. 12, provides that, in the construction of statutes, the word "persons" may extend and be applied to corporate bodies. *Held*, that the seizure and sale of the personal property of a railroad company to satisfy a tax assessed against its lands is thereby expressly authorized.

2. SAME—FUEL—WHEN SUBJECT TO LEVY.
Coal belonging to a railroad company, and stored in its sheds, designed for, but not in actual use in, the peration of its locomotives, is personal property, subject to levy and sale under a tax warrant.

Appeal from Marquette; Stone, J. Submitted April 13, 1897. Decided May 25, 1897.

Bill by the Chicago & Northwestern Railway Company against William J. Ellson, treasurer of Onota township, Alger county, to restrain the sale of a quantity of coal under a tax warrant. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

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*R. C. Flannigan*, for complainant.

*M. J. Sherwood*, for defendant.

LONG, C. J. This bill is filed to restrain the defendant, who is township treasurer of the township of Onota, Alger county, from selling a quantity of coal for a tax assessed upon certain lands of complainant. It appears by the bill that the complainant is a railroad corporation, operating a line of road for the transportation of persons and property and the mails of the United States, extending through the States of Michigan and Wisconsin to the city of Chicago, and through or into three other States. It is the owner of a quantity of lands situate in the township of Onota, Alger county. These lands were granted to the complainant company to aid in the construction of a portion of its road in Michigan, and are owned and held by the complainant in its private capacity, are not used or necessary for use in the operation of the road, and are subject to taxation. The taxes for the year 1896 upon these lands were not paid, and the defendant, by virtue of a tax warrant issued thereon, seized about 1,500 tons of coal belonging to and situate in coal sheds of complainant at the city of Ishpeming, county of Marquette, and advertised the same for sale, to satisfy the tax assessed upon the lands. It is admitted by the bill that all the proceedings for the assessment of the tax, and the proceedings of the treasurer to collect the same in the county of Marquette as a personal claim against the complainant, were regularly and legally taken; but the bill alleges that the coal levied upon was necessarily used, and was necessary for use, in the due and proper operation of the road, in the transportation of passengers and freight, and the carriage of mails, to the full performance of the duty which the complainant owed to the public as a common carrier, and to the exercise of its franchise to operate the road; that the necessities of the business of the public, both domestic and interstate, required that there be no interference with or interruption of the operations of the road

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that, unless the complainant could continuously use the coal, its business of transportation and carriage of the mails would be seriously interrupted, and the running of trains disarranged and confused, and the complainant greatly damaged thereby. The complainant nowhere alleges its inability to pay the tax, or sets out any grounds upon which illegality in the tax levied against its lands is alleged, but bases its whole reason for asking the interference of a court of equity to restrain defendant from enforcing the payment of the tax on the ground that the property in question is exempt from distress and sale under the tax warrant. To this bill the defendant interposed a demurrer, which, upon the hearing below, was sustained, and the bill dismissed. The complainant appeals.

The question is presented whether the purely personal property of a railroad corporation occupies a different position under the tax laws of this State from the personal property owned by an individual, and therefore whether the coal seized by the defendant is subject to seizure under his tax warrant. Counsel for complainant contends that there is no statute expressly authorizing the seizure and sale of the personal property of a railroad corporation to pay the tax due the State; that it is a question of public policy in respect to which the sovereign power alone is authorized to deal; that it is not within the province of the courts, and they are not entitled, to specify what provision should have been made to further the collection from corporations of this character of private debts or public dues, and then to adjudicate as if the same had been made, but rather to ascertain whether the State, by unequivocal declaration of its legislature, has made provision for the collection.

We are satisfied that there is sufficient authority found within the tax laws to warrant the action of the defendant in seizing and selling this coal under his warrant. Section 47, Act No. 206, Pub. Acts 1893, as amended by Act No. 229, Pub. Acts 1895, provides:

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"If any person shall neglect or refuse to pay any tax assessed to him, the township or city treasurer, as the case may be, shall collect the same by seizing the personal property of such person to an amount sufficient to pay such tax, fees, and charges for subsequent sale, wherever the same may be found in the county in which such treasurer resides, or in an adjoining county thereto, and, in case of assessment upon the personal property of corporations organized under the laws of this State for the purpose of engaging in maritime commerce and navigation, wherever personal property of such corporation may be found within the State; and from which seizure no property shall be exempt. He may sell the property seized to an amount sufficient to pay the taxes and all charges in the place where seized," etc.

The word "person," as used in this statute, must be applied to bodies corporate and politic, as well as to individuals, under subdivision 12, § 2, 1 How. Stat.

Counsel for complainant contends that this provision of the tax law means that no property of an individual shall be exempt, and that it does not cover the property of railroad corporations, as it does not specifically designate them. He bases his contention that this property cannot be taken on the ground that the rule of public policy forbids, and that the property of a railroad is an entirety, and, since a portion is not liable to seizure under execution or on a tax warrant, all of it is alike exempt, and that the complainant owes certain other duties to the public, and may be forced to perform them.

In the case of *Lake Shore, etc., R. Co.* v. *City of Grand Rapids*, 102 Mich. 374, the bill was filed for the purpose of vacating a local assessment upon the railway company's property, on the ground that the complainant was not liable to assessment for municipal street improvements, and to enjoin the mayor from executing a deed on a sale of the premises, which was a portion of the right of way, the roadbed of complainant's road, including a freight house on such right of way. While it was held that this property could not be sold under the provisions



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of the city charter for the nonpayment of local assessments, yet the assessment was held valid. The city contended in that case that the tax might be collected from the personal property of the complainant, under the amendment of 1893 to the charter. It was said in that case:

"If there were a general clause in the charter authorizing the collection from the personal property of the corporation, we could see no difficulty in enforcing the collection, as we are of the opinion that, though the lands and premises assessed cannot be sold for the tax for the reason stated, yet the assessment for the local improvement is valid."

In *Hackley* v. *Mack*, 60 Mich. 604, the sheriff was acting under a warrant from the auditor general. It was said:

"We have no law that we have yet discovered, and certainly none has been pointed out to us, which authorizes the sheriff to levy upon the track or roadbed of a railway, even against the corporation. If any levy can be made upon the property of the company aside from such goods and chattels as may be found, seized, and taken into custody by the sheriff, it is only on the franchise of earning tolls, as provided by the corporation laws."

Freeman, in his work on Executions (2d Ed., § 179), speaking of the rule laid down in *Plymouth R. Co.* v. *Colwell*, 39 Pa. St. 337 (80 Am. Dec. 526), says:

"A railroad company can no more discharge its public duties without locomotives and passenger and freight cars than it can without a franchise, a track, or a depot; and yet the existence of these great corporations, with all the property, real and personal, essential or at least highly beneficial to their successful operation, entirely exempt from execution at law, would be insufferable. So comprehensive an exemption will not now be sustained. So far as any general rule can be formulated upon the subject, it is this: That property of a corporation is not subject to execution which is not subject to voluntary transfer by the corporation. The mere right or franchise to be a corporation is never, in the absence of special statutory authority, subject to sale, whether voluntary or under execution."

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The rule laid down in *Louisville, etc., R. Co.* v. *Boney*, 117 Ind. 501, was that while the franchise and privileges of a railroad company, its lands, easements, and things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, could not be sold on execution to satisfy a judgment at law against it, yet the locomotives, cars, and other personal property could be when not in actual use.

In *Stevens* v. *Railroad Co.*, 31 Barb. 590, the court, in speaking of locomotives, cars, tools, machinery, etc., of the company, said:

"The property in question, then, is either personal or real property. It must, in the nature of things, be one or the other. It cannot be both, nor can it for any legal purpose be said to partake of the nature of both. * * * It has always heretofore been treated as personal property, liable to seizure and sale on execution. * * * To sell the rolling stock of a railroad would no more be a destruction of the road in legal contemplation than the sale of a farmer's teams, stock, and farming utensils would be a destruction of his farm. In either case there may be a necessity of keeping the personal property, arising out of the pecuniary inability of the owner to replace it, and thus make the use of the other property, to which the personalty was essential, profitable. But the law regards no such necessity as this for any purpose; certainly not for the purpose of enabling a debtor to retain his property for his own emolument, and set his creditors, or any class of them, at defiance. * * * The franchise granted to a railroad company to construct and operate a railroad is undoubtedly accompanied with an implied obligation on the part of the company to construct and operate such road, and, for a failure to fulfill this obligation, the franchise may be forfeited, and the grant may be annulled by the legislature. But that the law will permit the company to hold property for its own private emolument which the labor and money of creditors nas contributed to furnish, * * * on the ground that the public is interested in the success of the company and the continuance of its operation, is a novel and, to me, a startling proposition."

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In *Randall* v. *Elwell*, 52 N. Y. 521 (11 Am. Rep. 747), it was said:

"The only remaining question is whether the cars were the personal property of the company against which the tax was levied, or a part of its real estate. If the former, no question can be made but that the collector had the right to levy on and sell them for the purpose of collecting the tax, being at the time in possession of the company against which the tax warrant was issued, irrespective of the lien or title of any other person by mortgage or otherwise. If the cars were a part of the real estate, it is equally clear that the collector had no right to levy upon or sell them. * * * The question does not at all depend upon the length of the road, or whether the road of one company connects with that of others of the same gauge, and the companies so connecting, in the transaction of their business, are in the habit of running the cars of each over all the roads so connecting, or whether the road has no connections, and consequently, in the transaction of its business, its cars do not run beyond its own track. I think no one would claim that a car of the New York Central, which, in the course of business, had been run to Chicago, was part of its real estate while there; and, if not such, I can discover no principle upon which the character of the property should be changed when it reached the Central track upon its return trip to New York. It must be borne in mind that the defendants in this case can claim no equity upon the ground that they acquired title by purchase upon the foreclosure of a mortgage given to secure the bonds of the company, as the collector's warrant overrides all equities of third persons in the property. * * * My conclusion is that they were personal property, and, as such, were liable to be seized and sold for the collection of a tax against the company. The reasons upon which this conclusion is based will be found in *Stevens* v. *Railroad Co.*, 31 Barb. 590, and in *Beardsley* v. *Ontario Bank*, Id. 619, and the authorities cited and reviewed, and a repetition here is unnecessary."

In *Williamson* v. *Railroad Co.*, 29 N. J. Eq. 311, it was said:

"Where the question has been directly presented whether the rolling stock of a railroad, included in a

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mortgage of its roadbed and franchises, is real or personal property, the great weight of authority is in favor of its being considered as personalty,"—citing in addition to the cases heretofore cited: *Boston, etc., R. Co.* v. *Gilmore*, 37 N. H. 410 (72 Am. Dec. 336); *Coe* v. *Railroad Co.*, 10 Ohio St. 372 (75 Am. Dec. 518); *City of Dubuque* v. *Railroad Co.*, 39 Iowa, 56.

The court said further: "In this State the point was directly decided by the supreme court in *State Treasurer* v. *Somerville, etc., R. Co.*, 4 Dutch. 21."

In *Union Trust Co.* v. *Morrison*, 125 U. S. 591, at page 609, it was said:

"But it must be conceded that, until the mortgage was enforced by entry or judicial claim, the personal property of the railroad company was subject to its disposal in the ordinary course of business, and, as such, was liable to be seized and taken on execution for its debts. This is not only the common law, but the positive law of Illinois."

In *Pennock* v. *Coe*, 23 How. 117, 131, the case presented the question whether a mortgage covered the rolling stock, and was prior to a levy of execution issued upon judgment. The court said:

"The court might, upon any unreasonable resistance of the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it."

See, also, *Sangamon, etc., R. Co.* v. *Morgan Co.*, 14 Ill. 163 (56 Am. Dec. 497); *Maus* v. *Railroad Co.*, 27 Ill. 77; *Priestman* v. *U. S.*, 4 Dall. 28; *Midland R. Co.* v. *Stevenson*, 130 Ind. 97; *Titus* v. *Mabee*, 25 Ill. 257; *Farmers' Loan & Trust Co.* v. *Railway Co.*, 3 Dill. 412; *Union Loan & Trust Co.* v. *Motor Road Co.*, 51 Fed. 850; Cooley, Tax'n (2d Ed.), 369, 441, in which it was said:

"The rolling stock of railroads is sometimes treated as personalty, and sometimes as fixtures, under tax laws; and perhaps under some laws it may be both,—that is, it may be included in the assessment of the road as realty, but be subject to be taken as personalty on process issued

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for the enforcement of the tax levied. * * * What property shall be subject to distress, the statute itself will determine, and it may or may not be the same which is subject to execution on judgments."

We cannot sustain the complainant's contention that this coal is to be treated as a part of the entirety of this road. It is seen, under the cases cited, that it cannot be treated as a part of the realty, but is personal property, and was not in actual use at the time of the seizure. That it may have been convenient for the use of the company in the operation of its road no one can question, but, being personalty, it is subject, under the provisions of the statute, to levy and sale for the payment of the tax owing by the company. It is true, as contended by complainant, that in the State of Wisconsin rolling stock and fuel are declared to be fixtures; but the statute of Wisconsin makes the declaration, and hence the courts have held that it is a question of public policy in that State, and do not permit rolling stock and fuel to be taken upon execution or tax warrant. In Montana the same rule is adopted, but in both States the courts have but followed the provisions of the statute. We are satisfied from an examination of adjudicated cases that the weight of authority in this country is in favor of treating rolling stock and fuel as personalty, liable to seizure on execution and tax warrant. But, aside from this, we think our statute expressly provides that a tax warrant may be levied upon such property for the payment of taxes, and that no personal property is exempt from such seizure and sale.

The judgment of the court below is affirmed.

GRANT, HOOKER, and MOORE, JJ., concurred with LONG, C. J. MONTGOMERY, J., concurred in the result.

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## MONFORTON v. DETROIT PRESSED BRICK CO.

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1. MANUFACTURING COMPANIES — DANGEROUS MACHINERY — SAFEGUARDS—DUTY TO PROVIDE.

The statutory duty imposed upon manufacturers by Act No. 126, Pub. Acts 1893, §§ 11, 12, to provide certain safeguards for machinery in the discretion of the factory inspector, does not exist until the inspector has declared such safeguards necessary.

2. MASTER AND SERVANT—UNCOVERED SHAFT—NEGLIGENCE.

No recovery can be had against an employer for the death of an employé 14 years of age, resulting from his coming in contact with an uncovered revolving shaft, where the deceased had no duties to perform with or about the shaft, and had been warned to keep away from it.

Error to Wayne; Carpenter, J. Submitted April 14, 1897. Decided May 25, 1897.

Case by Mary E. Monforton, administratrix of the estate of Charles Monforton, deceased, against the Detroit Pressed Brick Company, to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. A verdict for plaintiff was vacated by the court, and judgment entered for defendant. Plaintiff brings error. Affirmed.

*B. T. Prentis*, for appellant.

*Robert Young*, for appellee.

MOORE, J. Charles Monforton was on March 20, 1894, killed in defendant's brick yard by an uncovered rapidly revolving shaft. This suit was brought by his mother, who had been appointed administratrix, to recover damages for his death. After the testimony was all in, the defendant requested the trial judge to direct a verdict in its favor. The court declined to do this, but upon his

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own motion submitted this question to the jury: "Was the uncovered shafting open to Charles Monforton's observation during the period of about 20 days in which he was in defendant's employ before his death?" and directed the jury to answer the question "Yes." He then submitted the case to the jury, who returned a verdict in favor of the plaintiff; then, upon motion of the defendant, set the general verdict aside, and entered a verdict upon the special finding in favor of the defendant. Plaintiff appeals.

It is evident from an inspection of the record that the learned trial judge was in doubt whether the plaintiff had made a case or not, and desired to resolve that doubt before directing a verdict in favor of the defendant; that afterwards he concluded a verdict ought to have been directed in favor of the defendant, for that is the practical result of what was done by him. We shall dispose of the case as though he had directed a verdict in favor of the defendant. If there was any testimony which required the case to be submitted to the jury, the judgment should be set aside; otherwise it should stand. All of the testimony is returned with the record, from which it appears that Charles Monforton, at the time of his death, was 14 years and 8 months old. He was an intelligent boy. One of the witnesses speaks of him as a smart boy. He had never worked in a place where there was shafting or machinery until he entered the employ of defendant on the 1st day of March. The accompanying rough sketch will illustrate the situation of the brick yard.

Young Monforton was employed from March 1st to March 16th in the press room, dusting off bricks with a brush. That was all he was engaged to do at that time. There was testimony tending to show that upon the morning in question he and two other boys were employed to unload a car load of wood. The wood was taken from a car, and placed in a cart, Vivian working in the car, and Kumm driving. They started from southwest of the yard, drove east along a wagon road which runs along the

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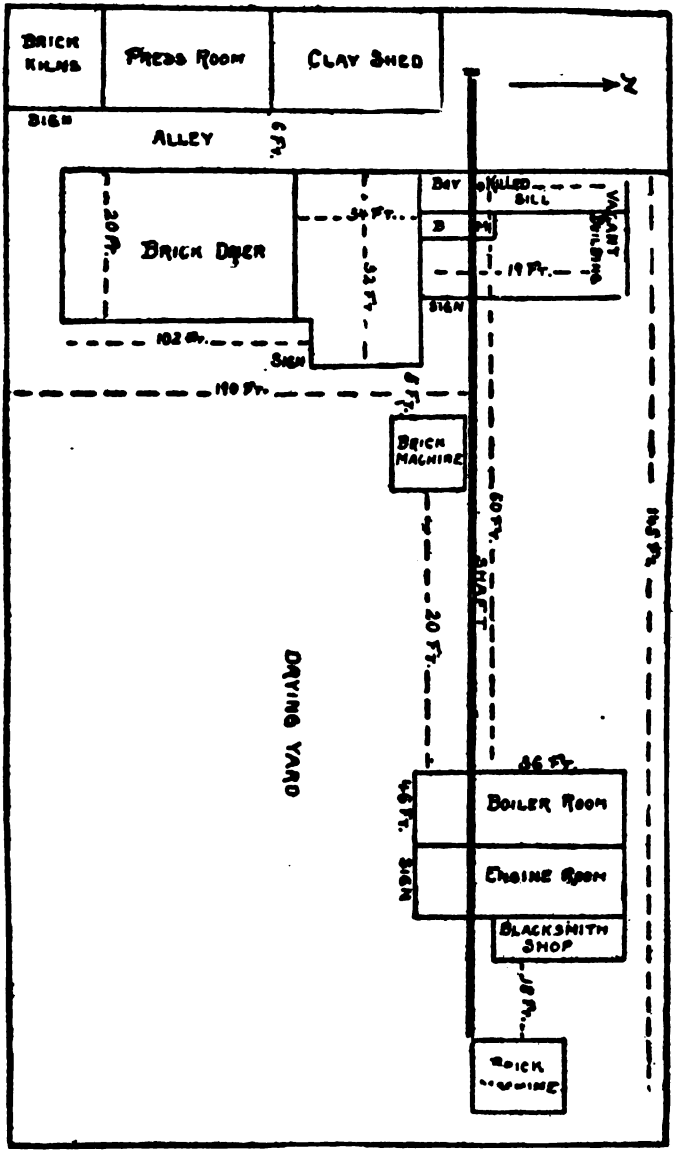


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south part of the yard, then north around the east end of the shaft, and then west back to the door of the boiler room, where they unloaded the wood; returning the same way. After Vivian and Charles unloaded the wood, they went into the press room. There was testimony tending to show that Mr. Heileman, foreman of the press room, sent Charles from there to the engine room for some oil. The engineer testified that, about a half hour after Charles got through hauling the wood, he came in and said Mr. Heileman had sent him for oil; that he had come for oil before; that he did not give him the oil, so he went out, and the engineer thought he would come back, and he would give him the oil. He went westerly towards the press room. Soon after the engineer heard that a boy was killed. He ran at once to the shed 50 to 100 feet from the engine room, and found the boy right underneath the shaft in the shed. The shaft was about 200 feet long and 2½ or 3 inches in diameter, and was from 12 to 16 inches from the ground. Just above where the boy was found there was a collar about an inch thick around the shaft, with a set screw which projected through the collar three-quarters of an inch or more. The boy received injuries from the effects of which he died in about an hour. The injuries were received in a shed which was originally closed at the back and ends and open at the front, and was only used for the storage of truck. Some witnesses said some of the boards were off the shed. The shed was not in the regular line of travel between the press room and the engine room. There was a sign over the entrance, "No Admittance." There was no occasion for persons to go into the shed. No one saw the accident, or knows how it occurred, or what motive induced young Monforton to go to the shed.

The evidence also discloses that, six or seven days before the accident, one of the workmen saw young Monforton playing with the shaft by putting his hands upon it, and by throwing boards at the shaft, and letting them fly back, and warned him of the danger. The foreman of

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the press room, who had been told of his playing with the shaft, warned him to keep away from it. The shaft was put up in 1890, and the foreman testified there had never been any accident there, to his knowledge, though the engineer testified that a small piece was torn out of his trousers at that point when he had gone there to oil a bearing. There was testimony to the effect that some of the workmen sometimes went into the shed to eat their dinners. There is no testimony in the record that there was any occasion incident to the employment in which he was engaged that required young Monforton to go into the shed, or go near the shaft where the accident occurred. His work was all a good many feet away from it. Nor was he required to go near the shaft in going to and from his work.

It is the claim of the plaintiff that defendant is guilty of negligence because it did not protect the shaft as required by sections 11 and 12 of Act No. 126, Pub. Acts 1893. No factory inspector visited the shop until in May, when, at his suggestion, the shaft was inclosed. A law containing like provisions has so recently been considered by this court that it is not necessary to repeat what was said in that case. *Borck* v. *Michigan Bolt & Nut Works*, 111 Mich. 129.

It is the claim of plaintiff that to leave a shaft in the condition this one was in was negligence, and that the question of whether the deceased was guilty of contributory negligence should have been submittted to the jury; citing a great many cases, all of which have been examined with care. Nearly all of them relate to cases where the injured party was employed in running hazardous machinery, or where he was put at work in such close proximity to dangerous machinery as to make his employment hazardous, but I do not think any of them are in point here. The boy was not employed to work with or about the shaft. His duties did not require him to go anywhere near it. He was advanced sufficiently in years so that he ought to have known that a shaft with a collar upon it, revolv-

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ing 150 times a minute, was dangerous. He was warned of the danger. There was nothing in the character of his duties that would lead his employer to suppose that he would go near the shaft or incur any danger because of it. The accident is greatly to be regretted, but it did not occur under such circumstances as to make defendant liable.

Judgment is affirmed.

The other Justices concurred.

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113 44
124 351

## HAYNES *v.* CITY OF HILLSDALE.

113 44
142 627

1. DEFECTIVE SIDEWALKS—EVIDENCE—NOTICE.
   Under a declaration charging defendant with permitting a sidewalk to become and remain rotten and out of repair, plaintiff may show that the walk had not been rebuilt or repaired for upwards of 20 years.

2. SAME—REMARKS OF COURT—PROVINCE OF JURY.
   For the court to remark in the presence of the jury, upon the trial of a suit for injuries alleged to have been sustained because of a defective sidewalk, that the fact that the walk would spring when walked upon was not, in itself, a defect which would entitle plaintiff to recover, is reversible error; the weight of such evidence being for the jury.

3. SAME—NOTICE.
   Evidence that other portions of the walk, built at the same time as that portion whereon the accident occurred, were out of repair, was admissible on the question of notice.

Error to Hillsdale; Lane, J. Submitted April 14, 1897. Decided May 25, 1897.

Case by Mary E. Haynes against the city of Hillsdale for personal injuries. From a judgment for defendant, plaintiff brings error. Reversed.

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*W. J. Sampson* and *F. H. Stone*, for appellant.

*Chester & Twiss*, for appellee.

LONG, C. J. The plaintiff lived about six miles from the city of Hillsdale. She was injured on a sidewalk in the defendant city. On a trial before a jury, verdict was rendered in favor of the defendant. It appears that July 27, 1894, while the plaintiff was passing along the walk in front of the courthouse, a board in the walk broke under her weight, her foot caught under the next board, turning that over, and she fell forward, receiving severe injuries, for which suit is brought. The walk was constructed of wooden stringers, running lengthwise, with boards about six inches wide nailed crosswise. The center stringers had entirely rotted away with age, and the outside ones were but little better. The board which broke had rotted away on the underside, until but a mere shell of sound wood remained on the upper surface. The street on which the accident occurred is named "McCollum Street." The streets on the sides of the courthouse square are Broad and Howell streets.

The entire walk on McCollum street, from Broad to Howell street, was built in 1873; and plaintiff offered to show that it had remained without being repaired or rebuilt since that time. This walk is about six rods in length between those streets. This evidence should have been permitted. The declaration charges that the defendant permitted a section of said walk, east of and near Howell street, to become and remain out of repair, rotten, loose, and dangerous, and the boards and stringers composing the same to become and remain loose, rotten, broken, and torn up, and liable to tip up, turn over, and spring down when pedestrians were passing along and over the same. The declaration also charges notice to the city of such condition, and its knowledge of such condition. It was shown that, at the place where the accident happened,—that is, the section on McCollum street east of and near Howell street,—the walk would

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shake when walked over, and, if walked over near the ends of the boards, the opposite end would fly up; that the nails were out, and would not hold in the stringers when driven in; that the walk in that section looked all right, and its real condition was ascertainable only in walking over it.

One of the aldermen of the city testified that in June, 1894, he noticed, in passing over the walk, that it would spring as though the center stringer was rotten, or something of that kind; that in the same month he, with the city marshal, examined this walk, and found it would spring when walked on. The court stated, in the presence of the jury, that "the fact that the walk would spring is not, in itself, a defect which would entitle the plaintiff to recover." We think the court was in error in this statement, and that it was prejudicial to the plaintiff's case. It was a question for the jury, under all the circumstances, to say whether the walk was in a reasonably safe condition for public travel. The boards' springing up and down was some evidence of its bad condition, which, with other conditions shown, the jury had the right to consider. *Fuller* v. *City of Jackson*, 92 Mich. 207. The question also involved notice to the city of the walk's condition. The marshal and one of the aldermen had walked over it for the purpose of inspection prior to the accident.

The walk had been built for more than 20 years. It had remained without repair. The plaintiff attempted to show that other portions of this walk between Howell and Broad streets, built at the same time, were out of repair. This was excluded. This was error. *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 496; *Moore* v. *City of Kalamazoo*, 109 Mich. 176; *Will* v. *Village of Mendon*, 108 Mich. 251.

For these errors, the judgment below must be reversed, and a new trial ordered.

The other Justices concurred.

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## McRAE v. BENNETT.

ESTOPPEL—REPRESENTATIONS AS TO TITLE.

A representation by A. to B. that certain lumber is the property of C., thereby inducing B. to bring an action for conversion against C. instead of A., will not estop A. from thereafter asserting title to the lumber, upon which B. has levied under his judgment against C., where B. had no valid claim against either A. or C.

Error to Marquette; Stone, J. Submitted April 15, 1897. Decided May 25, 1897.

Replevin by Peter McRae against Samuel Bennett, deputy sheriff of Marquette county. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

*Hill & Rood*, for appellant.

*George Gallup*, for appellee.

HOOKER, J. McRae owned timber, which Girard engaged to cut and manufacture into lumber. Bellaire attached it in a proceeding against Girard on a labor claim, and took judgment by default. He bid in 400 logs, said to have been worth $1,200, at execution sale, for $98. The logs were not taken into his possession, and Girard manufactured them into lumber. Previous to the attachment, McRae made a bill of sale absolute in form to McArthur Bros. Co. of this and other timber as security for $38,000. An effort was made to replevy this property in the name of McArthur Bros. Co. before the sale on execution, but the sale was made before it could be

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done. Subsequently Bellaire brought his action by attachment against McArthur Bros. Co. for the conversion of the 400 logs, which had been manufactured by Girard into lumber, and the lumber intermingled with the lumber from other logs which McRae had assigned, as stated, to McArthur Bros. Co., and the property replevied in this case was seized by the defendant. McRae, having paid his indebtedness to McArther Bros. Co., thereby releasing the lumber from their claim, upon ascertaining that it was seized upon attachment against them for an alleged wrongful conversion, replevied it from the officer, and this is the case before us; the defendant, Bennett, having appealed from a judgment rendered against him on December 11, 1896. That McRae was the true owner of the lumber from the time it was felled to the time it was replevied seems to be clear, but counsel for the defendant attempt to justify the levy upon the ground that McArthur Bros. Co. were indebted to Bellaire, which they say the plaintiff cannot dispute, and that his levy upon this property must be treated as a levy upon McArthur Bros. Co.'s property by reason of the plaintiff's alleged admission that it did belong to McArthur Bros. Co., inasmuch as Bellaire was thereby induced to proceed against McArthur Bros. Co., instead of McRae, for the conversion of the lumber. Some time after the attachment, Bellaire took judgment against McArthur Bros. Co., who were not served with process and did not appear, for upwards of $1,000, upon the claim that they had converted his logs.

The alleged estoppel rests on the testimony of the witness Mead, who testified as follows: "I am an attorney, and reside at Escanaba. I know the plaintiff, and was requested, by letter from Hill & Rood, to call upon and see him.

"*Mr. Hill:* Have you that letter with you?

"*A.* Yes, sir." (Letter produced and received in evidence, and reads as follows:)

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"WILLIAM S. HILL, Lawyer, Marquette, Mich.

"MARQUETTE, MICH., Sept. 2, 1895.

"F. D. MEAD, Esq.,

"Escanaba, Mich.

"*Dear Sir:* There is a quantity of lumber at Little Lake on Northwestern road, which belongs to Peter McRae or McArthur Bros., of Canada. With this lumber has been mixed 80,000 feet belonging to our client. We wish to make a demand upon the owners of this lumber for our lumber, and, in case of refusal, to bring trover for its value. We wish you would see McRae, and if he claims to be owner of the lumber, or to be agent of McArthur Bros., and they prove to be the owners, make a demand upon him for it in the name of Ed. Bellaire.

"Yours truly,

"HILL & ROOD."

*Witness:* "Upon receipt of this letter I saw Mr. McRae on the 3d of September, and made a demand on him for this lumber, and stated, I think, the substance of that letter. He said that he declined to surrender it. He said that the lumber belonged to McArthur Bros., and that he was their agent. He declined to surrender it. He said, I believe, that Mr. Bellaire had sold or obtained a judgment against the lumber, and that the sheriff had sold it, and he had no right to do it. Then half an hour afterwards, on the same day of the interview, I wrote this letter." (Letter produced and received in evidence. Reads as follows:)

"Law Office of MEAD & JENNINGS, Escanaba, Mich.

"Sept. 3, 1895.

"HILL & ROOD,

"Marquette, Mich.

"*Gentlemen:* Your favor of Sept. 2d at hand. I have seen Peter McRae. He says that the lumber belongs to McArthur Bros.; that he is their agent. I made a demand upon him in the name of Ed. Bellaire. He says that he understands that Bellaire has a judgment against Girard, and that you sold McArthur Bros.' lumber in satisfaction of it, and that you had no right to do so, and he declined to surrender the lumber. He says that he thinks Girard will settle your judgment, that he saw him a short time ago.

"Very truly,

"F. D. MEAD."



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Witness, proceeding further, testified: "At the time we were talking about this lumber, he stated that the lumber Bellaire had sold belonged to McArthur Bros., and that he had sold their lumber in satisfaction of the justice's court judgment. He stated that he thought that Girard would settle for the judgment. He had seen Girard about it. I then made a demand on him for the lumber, in accordance with your request in the matter, and he said he was agent for McArthur Bros., and this lumber belonged to them, and he declined to deliver it."

It is plain that Bellaire had no valid claim for conversion against either McArthur Bros. Co. or McRae, because he never owned the lumber, or the logs from which it was made. Had we before us the trover case against McArthur Bros. Co. it would not be contended that Bellaire could recover, and the same would be true had the action in trover been brought against McRae. To sustain their claim, counsel for the defendant find it necessary to contend—*First*, that McRae cannot question the validity of the judgment against McArthur Bros. Co.; and, *second*, that he cannot dispute their ownership of the property replevied. Incidentally they argue that the plaintiff must recover upon the strength of his own title, and not the weakness of the defendant's; that, as he is estopped from asserting title, he cannot recover in this case. The conversation between Mead and McRae related to Bellaire's claim of title to this lumber. Mead testified that McRae said that Bellaire had no valid claim to the lumber, and he (McRae) should not give it up. It was admittedly in his possession. Mead says that he told McRae that the demand was made upon the claim that Bellaire owned a part of this lumber, and it is plain that whatever was said by McRae was with the understanding that the action of trover was to be brought on that basis. He knew that Bellaire had no valid claim against either himself or McArthur Bros. Co. He cannot be supposed to have anticipated that any other claim would be set up. The property was attached for a tort, and he replevied it at

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once. The title might have been tried in that suit, but Bellaire preferred to take a judgment on default against parties who were not served with process, and who did not own the property attached, as a matter of fact. The only shadow of validity of that judgment is cast by this alleged estoppel. In order to prove the estoppel, Bellaire had to prove that he was proposing to bring an action of tort upon a claim totally devoid of merit. He told the plaintiff he proposed to bring trover upon a conversion of his logs, when he owned no logs, and the plaintiff knew he had none. He now has no further use for his claim, but asks that the plaintiff be not allowed to go back of the judgment against McArthur Bros. Co., and that he be estopped because he suffered him to sue McArthur instead of himself, although he had a valid claim against neither. It is not claimed that he had a right to recover against anyone, but that he did recover, and it seems to be thought that the courts should aid him to perpetrate a fraud, through an estoppel, by the application of a technical rule which is said to preclude the plaintiff from disputing the validity of Bellaire's judgment. The substratum of estoppel is the fraudulent character of the representation, and its effect in wronging the person who relies upon the estoppel. But here it is proposed to use it as a sword, and to perpetrate a wrong upon the plaintiff by subjecting his property to a judgment confessedly unjust, not only against McArthur Bros. Co., the defendants therein, but as against the plaintiff himself.

We think the circuit judge did not err in directing a verdict for the plaintiff, and his judgment is affirmed.

The other Justices concurred.

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## HENDRICK *v.* MINOR LUMBER CO.

APPEAL—STIPULATION OF PARTIES—REVIEW.

An agreement by counsel, without action of the court, that a demurrer to a declaration, which had been overruled, should stand overruled as to an amended declaration, presents no question for review on appeal, since parties cannot stipulate causes into the Supreme Court.

Case made from Alpena; Kelley, J. Submitted April 15, 1897. Decided May 25, 1897.

Case by Cyrus Hendrick, administrator of the estate of William H. Hendrick, deceased, against the Minor Lumber Company, for the alleged negligent killing of plaintiff's intestate. A demurrer to the declaration was overruled, and defendant appeals. Dismissed.

*Charles R. Henry*, for appellant.

*J. D. Turnbull*, for appellee.

PER CURIAM. There is no case set out in this record which can properly be heard. The original declaration was demurred to, which demurrer was overruled by the court below. By agreement of counsel, and without further action upon the part of the trial court, an amended declaration was filed, the demurrer to stand overruled as to that. Parties cannot stipulate causes into this court.

The appeal will be dismissed. Neither party will recover costs.

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## *In re* BROMLEY'S ESTATE.

113 53
155 340

1. WILLS—UNDUE INFLUENCE—ATTORNEY AND CLIENT—PRESUMPTION.

The presumption of undue influence arising from the fact that the husband of the principal beneficiary had acted as the attorney of the testatrix in some matters of business, though not in the drawing of the will, may be rebutted by showing that she made her will after receiving independent legal advice.

2. SAME—INSTRUCTIONS—BURDEN OF PROOF.

A contestant of a will cannot complain on appeal that the jury were not instructed that the proponent had the burden of overcoming the presumption of undue influence, which arose from the confidential relationship existing between the testatrix and the beneficiary, where he failed to prefer such a request.

3. COURTS—PRESIDING JUDGE—CONSTITUTIONAL LAW.

Act No. 152, Pub. Acts 1895, which authorizes the governor, when business has accumulated in any of the circuit courts of the State beyond the capacity of the local judge properly to dispose of it, to designate a judge of some other circuit to hold court in the former circuit temporarily, is valid under article 6, § 11, of the Constitution, providing that the circuit judges may hold courts for each other, and shall do so when required by law.

Error to Wayne; Aldrich, J., presiding. Submitted April 27, 1897. Decided May 25, 1897.

Nettie L. Donovan presented for probate the last will and testament of Lizzie M. Sherman Bromley, deceased, which was duly allowed, and George E. Bromley and others appealed to the circuit court. From a judgment for proponent, contestants bring error. Affirmed.

*J. Willard Babbitt* (*William B. Jackson*, of counsel), for appellants.

*Washington I. Robinson*, for appellee.

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MONTGOMERY, J. Decedent executed a will on the 24th day of December, 1889, making Nettie L. Donovan her residuary legatee. She continued to live until the 30th of September, 1895, and for some years prior to the execution of her will, and after its execution until her death, lived with Mr. and Mrs. Donovan. She was a teacher in the Cass school for many years, and was a single woman. Judge Donovan, the husband of Nettie L. Donovan, had been her attorney in some matters of business. The sole question raised on the trial was whether the will was procured by undue influence. The circuit judge charged the jury as follows:

"Where a person devises his property to one who is acting at the time as his attorney, either in relation to the subject-matter of the making of the will, or generally, during that time, such devise is always carefully examined, and of itself raises a presumption of undue influence. But this is by no means a conclusive presumption, but it is one that may be overcome by evidence; and it is not necessary that that evidence shall in all cases be a positive denial of parties who are personally acquainted with the facts, but it must be such evidence as will lead the jury to believe that no undue influence was exerted. And if such evidence be found from the facts and circumstances surrounding the making of this will as will lead you to believe that the will was made by the testatrix of her own free will, uninfluenced by any other person, then the fact that Joseph W. Donovan was her attorney would not in any way invalidate the will. That should simply be taken into consideration, with all the other facts, to determine whether or not the will was, as a matter of fact, the will of the testatrix."

We think these instructions fairly embodied the law of the case. While a bequest in favor of an attorney who draws a will is a circumstance arousing suspicion, and raises a presumption more or less strong that undue influence has been exerted, yet, as was very properly charged at the request of the contestants themselves, the presumption of the invalidity of a will made by a client to her attorney may be rebutted by showing that she made her will after receiving independent legal advice. In the present

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case the will was not drawn by Mr. Donovan, but was prepared in the handwriting of deceased herself, after conferring with Mr. Stellwagen. It is also true that the presumption of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed freely, and under circumstances which rebut the inference of undue influence; and, where the proof of execution is such as to convince the jury that the testator was not at that time under the control of the legatee, it is certainly not error to at least permit the jury to draw the inference in favor of the validity of the will from the circumstances. See *Waddington* v. *Buzby*, 45 N. J. Eq. 173 (14 Am. St. Rep. 706); *Post* v. *Mason*, 91 N. Y. 539 (43 Am. Rep. 689).

It is said that the court did not, in his charge, point out to the jury that the burden is upon Mrs. Donovan to rebut the presumption of undue influence. No request asking this distinct instruction was preferred by contestants' counsel, and for this reason the question is not open for consideration. Furthermore, we think the charge, as a whole, correctly indicated to the jury that the burden does rest upon the proponent to overcome the presumption that arises from the confidential relation.

One other question remains to be noticed. The case was tried before Judge Aldrich, under the authority of Act No. 152, Pub. Acts 1895, which provides that, when business is accumulated in any of the circuit courts of the State beyond the capacity of the judge or judges of such circuit to properly dispose of it, the governor may designate a judge of some other circuit to hold court temporarily. The contention is that there is no constitutional authority for this enactment. But section 11, art. 6, of the Constitution, provides, in terms, that judges of the circuit court may hold courts for each other, and shall do so when required by law. We think the statute, in so far as it authorizes the governor to designate a judge of another circuit to hold court in a circuit where the business has accumulated beyond the capacity of the judge or

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judges of such court to properly dispose of it, is fully authorized by the provisions of this section of the Constitution. See *Toll* v. *Jerome*, 101 Mich. 468.

We find no error in this record, and it will be affirmed.

The other Justices concurred.

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RHODE *v.* HASSLER.

113 56
123 102

EXECUTION—IRREGULAR SALE—REMEDY.

A purchaser of land against which a certificate of levy has been filed may obtain relief against an irregular sale of the interest of the judgment debtor by application to the court wherein the judgment was rendered, but a bill will not lie to set aside the levy and sale as a cloud upon his title.

Appeal from Wayne; Lillibridge, J. Submitted April 27, 1897. Decided May 25, 1897.

Bill by George Rhode against Frank H. Hassler to remove a cloud from title. From a decree dismissing the bill, complainant appeals. Affirmed.

In October, 1891, one Mary J. Hopper owned a tract of land situated in the township of Grosse Point, Wayne county, consisting of about 27 acres, and conveyed the same to four parties, of whom one Samuel Lyons was one. They soon after recorded a plat of a portion of this land, laid out in lots. The interest of Lyons was levied upon, and certificate of levy filed April 1, 1892, he at that time owning an undivided three-eighths. On May 10, 1892, complainant took a quitclaim deed of all the lots in said plat, except one. The consideration paid to Mrs. Hopper was $6,500. $2,500 was paid in cash, and the balance of the purchase price secured by a mortgage of $4,000.

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January 23, 1893, the interest of Lyons in the land was sold to the defendant, Hassler, for $185, and a deed was executed January 23, 1894. On August 26, 1896, complainant filed this bill to set aside this levy and sale, and thereby remove a cloud from his title, upon the ground that Lyons' interest was sold in the entire subdivision, and not in lots as they were platted, in violation of section 6116, 2 How. Stat.

*William Look* and *Ira G. Humphrey* (*Edward Minock*, of counsel), for complainant.

*Thomas Hislop*, for defendant.

GRANT, J. The record of the levy was notice to complainant, and it is immaterial to determine when he had actual notice of the levy and sale. His agent was present at the sale, and knew that the interest of Lyons was sold as a whole. Complainant has mistaken his remedy. He should have applied to the court wherein the judgment was rendered to set aside the sale for the alleged irregularity. *Cavenaugh* v. *Jakeway*, Walk. Ch. 344; *Hoffman* v. *Buschman*, 95 Mich. 538.

The decree dismissing the bill is affirmed, with costs.

The other Justices concurred.

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## EARLY *v.* STANDARD LIFE & ACCIDENT INSURANCE CO.

ACCIDENT INSURANCE—EXCEPTED RISKS—DEATH BY POISON.

An exception in an accident policy of death or injuries resulting directly or indirectly from poison extends to cases where the poison is administered through the mistake of a druggist or physician.[1]

Error to Wayne; Carpenter, J. Submitted April 27, 1897. Decided May 25, 1897.

*Assumpsit* by Welthy A. Early against the Standard Life & Accident Insurance Company on a policy of insurance. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*George H. Prentis*, for appellant.

*Keena & Lightner*, for appellee.

LONG, C. J. This action is upon a policy of insurance upon the life of Michael Early, the husband of the plaintiff. The policy was made payable to the plaintiff in case of the death of the insured. It is undisputed that the policy was to be in force from October 18, 1892, to October 18, 1893. It appears that on August 29, 1893, Michael Early, feeling slightly unwell, went into a drug store in Detroit, and asked the proprietor to give him something to relieve the pain, and the proprietor, by mistake, gave him some aqua ammonia. It burned his mouth very severely, but he lived from that time to September 13, 1893 (some 15 days), when he died from the effects of the potion taken. Due proofs of death were made, and the defendant refused payment on the ground that the death was caused by means specially excepted in the policy. It

[1] On the question what constitutes an accident within the meaning of an insurance policy, there is an extensive note to *Fidelity & Casualty Co.* v. *Johnson*, (Miss ) 30 L. R. A. 206.

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was the contention of the plaintiff that death was caused by shock, and not by the poisonous substance. The court directed a verdict in favor of the defendant. Plaintiff brings error.

Counsel for plaintiff bases his contention upon the testimony of Dr. John J. Mulheron, who was called as a witness for plaintiff. He testified substantially that on August 29th he was called to attend the insured. He was asked:

"*Q.* What was his condition?
"*A.* I examined him, and found him suffering from a shock, and in a very weak condition of the pulse. On examining his mouth, I found that he had taken into it some irritant poison. His throat and mouth showed the effects of something of that nature. The irritation had extended to his lips, and they were also irritated. It was a burn such as would be caused by aqua ammonia, and the shock was what we would naturally expect from an irritant poison of that nature.
"*Q.* On the 13th of September, I think, he died?
"*A.* It was about that date.
"*Q.* From the effects of this shock?
"*A.* Yes; indirectly.
"*Q.* What, in your judgment, had he taken?
"*A.* Aqua ammonia.
"*Q.* In sufficient quantities to cause that trouble?
"*A.* Yes, sir."

To state the contention of counsel for plaintiff more specifically, it is that Mr. Early did not die from poison (that is, he was not poisoned), but died from the effects of the shock; that his whole nervous system was affected by the shock which he received when he found he had taken something he should not have taken, and that it was this that caused his death some time thereafter; that the aqua ammonia burned, and this produced the shock; that aqua ammonia is not what is considered by unprofessional persons as a poison; that his death was due to an accident, and not to poison.

The policy provides insurance "against the effect of injuries to the body caused by external, violent, and acci-

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dental means, within the meaning of this policy, its agreements and conditions printed herein or on the back hereof." On the back of the policy it is provided that the policy is accepted subject to the following conditions:

"This insurance does not cover * * * disablement occasioned directly or indirectly by any natural illness, bodily infirmity, disease, or disorder, unless it can be proved to be the direct result of an accidental injury sustained after this policy shall have taken effect, nor injuries of which there is no visible mark upon the body, nor death nor injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes, or conditions, or when affected by any such act, cause, or condition, or under its influence. * * * From any of the following causes: Intoxication, * * * poison, contact with poisonous substances," etc.

It is admitted on the part of the defendant that Mr. Early's death was caused by an accident (that is, that the taking of the aqua ammonia was accidental); and it is claimed, therefore, that the case is clearly within the exception to the policy which excludes from its terms death caused by accidental means resulting wholly or partly, directly or indirectly, from poison. It is further contended by counsel for defendant that the policy excepts death due to poison, without reference to how the poison causes the death, and without reference to any motive in the taking of it, or whether it is taken intentionally, voluntarily, or whether it is taken by oneself or administered by another person.

There can be no question, under the testimony in this case, that aqua ammonia is a poison. Dr. Mulheron expressly states it to be. The deceased, then, came to his death, in our opinion, by poison. It was accidentally administered, supposing it to be another substance. This could not take the case out of the exception, but rather brings it within the exception. The great weight of authority is in favor of the proposition that it is not necessary that the poison be taken with intent to produce death, in order to defeat a claim flowing from the right of membership.

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In *Cole* v. *Insurance Co.*, 61 Law T. N. S. 227, the policy insured against injuries caused by accidental, external, and visible means, and provided that "this insurance shall not extend to death by suicide, * * * or to any injury or death arising from disease, * * * or by poison," etc. It appeared that the insured, by accident, drank a poisonous mixture or liquid in mistake for medicine which he was in the habit of taking, and shortly afterwards died from the effects. Verdict was directed for the defendant. On motion for a new trial, Mr. Justice Mathew, speaking for the court, said:

"It is true that the policy in this case was intended to provide against accidental injury, but we must not treat that as all that the policy contains. The terms of the provisos must be given their due effect."

After reciting the proviso above quoted, the learned justice said:

"This is a clear and intelligible phrase. We are asked to insert after the word poison, 'unless accidentally taken or intentionally administered to the assured.' The only case of death from poison which would then be left in which the company would not be liable is that in which the assured intentionally took poison; but that is covered by the proviso as to suicide."

It was held that the accident came within the proviso.

In *Pollock* v. *Mutual Accident Ass'n*, 102 Pa. St. 230 (48 Am. Rep. 204), the policy insured against injuries effected through external, violent, and accidental means, provided that it should not extend to any bodily injury of which there should be no external and visible sign, or to any bodily injury caused directly or indirectly by the taking of poison. The insured, being present in a store where a salesman was offering for sale a sample of birch oil, and mistaking it for milk of birch, first tasted, then took a drink of, it, from the poisonous effects of which he died within 24 hours. It was admitted, in a case stated, that the deceased mistook the birch oil for milk of birch, which he had been in the habit of drinking; it being a

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harmless beverage, which closely resembled, in color, smell, and taste, birch oil. In an action by the beneficiary to recover the sum insured, it was held that the terms of the policy did not extend to that cause of death, and the judgment below was not disturbed.

In *Hill* v. *Insurance Co.*, 22 Hun, 187, the policy in suit was almost in the exact form as in the present case; but the words used in the exception read, "by the taking of poison," while the exception in the present one is "by poison" (that is, any death caused by poison). There it was held that the provision excepting from insurance a death caused "by the taking of poison" was not limited to cases of intentional self-poisoning, but included all cases in which the death was so caused. Cooke, Life Ins. § 56, lays down the same rule.

In *Batchelor* v. *Accident Ass'n*, reported in 34 Weekly Law Bulletin, page 239, published at Cincinnati, Ohio, the policy was in the exact form as in *Hill* v. *Insurance Co.*, *supra*. The insured died from an overdose of morphine. The case in the circuit court was ruled for the defendant, and on appeal to the supreme court the judgment was affirmed.

In *Paul* v. *Insurance Co.*, 112 N. Y. 472 (8 Am. St. Rep. 758), the court said:

"If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake."

We have not overlooked the cases of *Healey* v. *Mutual Accident Ass'n*, 133 Ill. 556 (23 Am. St. Rep. 637); *Mutual Accident Ass'n* v. *Tuggle*, 39 Ill. App. 509; and *Travelers' Ins. Co.* v. *Dunlap*, 160 Ill. 642. But in the present case the expression is, "death by poison." We know of no case which goes to the extent of holding that such an expression in the exception contained in the policy does not avoid it.

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The court below properly held that no recovery could be had in the case.

The judgment is affirmed.

The other Justices concurred.

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## KNEELAND v. AUDITOR GENERAL.

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s71NW 477
182 266

TAXES—SALE OF LANDS—WITHHOLDING DEED.

The auditor general is justified in withholding a deed of land sold for delinquent taxes under the tax law of 1893, where it appears that the taxes were paid upon a part of the land within the time prescribed by law, and he is unable to determine upon what part the taxes were so paid.

*Mandamus* by Fred A. Kneeland and another to compel Roscoe D. Dix, auditor general, to issue a tax deed. Submitted April 27, 1897. Writ denied May 25, 1897.

*Tweddle & Cross* and *Dodge & Covell*, for relators.

*Fred A. Maynard*, Attorney General, and *W. H. Foster*, Prosecuting Attorney, for respondent.

LONG, C. J. On December 4, 1895, lots 7, 8, 9, and 10, block 2, of the village (now city) of Traverse City, were sold by the county treasurer of Grand Traverse county, and bid in by the State, for delinquent taxes for the year 1893. The sale was made in pursuance of a decree of the circuit court for that county in chancery. In December, 1896, the relators purchased the State bid, and also bid in the lands for the delinquent taxes for the year 1894. The time for redemption having expired upon the sale of 1893, the relators demanded a deed of the premises from the auditor general. This being refused, the

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relators ask the aid of the writ of *mandamus* to compel the respondent to issue the deed.

The respondent, by his answer, shows that the lots were assessed for the year 1893 in four descriptions, as follows: *First*, lots 7 and 8, except 17 feet of lot 8; *second*, 17 feet of lot 8; *third*, lot 9, except 40 feet, and lot 10; *fourth*, 40 feet of lot 9. The respondent further shows that the property was advertised and sold as follows, and the taxes being for the following amounts: *First*, lots 7 and 8, $98.61; *second*, lots 9 and 10, $107.06. It appeared that within the time required by law taxes were paid upon the 17 feet of lot 8 and upon the 40 feet of lot 9. When application was made by the relators for the deed, the auditor general discovered the fact that the several parcels of land were assessed in the several descriptions as above set forth, and had been sold as two descriptions as above. There was nothing upon the records by which the auditor general could separate the properties, and distinguish upon what part of the lots the taxes had been paid; and hence he returns that he refused to issue the deed. The owner of the property afterwards tendered the balance of the money for the taxes, which was received by the auditor general, and the lands were discharged from the taxes. It is apparent that the auditor general could not determine upon what part or portion of those descriptions the taxes had not been paid, and consequently he could not issue a deed covering those portions only.

The writ must be denied.

The other Justices concurred.

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d127 546
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## FROHLICH v. GRAULICH.

PLEADING—COMMON COUNTS—APPEAL FROM JUSTICE'S COURT—AMENDMENTS.

Plaintiff, having declared on the common counts alone in justice's court, cannot amend his declaration in the circuit on appeal by adding a special count for breach of contract.

Error to Wayne; Carpenter, J. Submitted April 28, 1897. Decided May 25, 1897.

*Assumpsit* by Edward Frohlich against Clara Graulich for goods bargained and sold. From a judgment for plaintiff, defendant brings error. Reversed.

*Jonathan Palmer, Jr.*, for appellant.

*Durbin Newton* (*Maybury & Lucking*, of counsel), for appellee.

HOOKER, J. The plaintiff sued the defendant, a married woman, in justice's court, declaring on the common counts. The bill of particulars was as follows:

TOLEDO. EDWARD FROHLICH GLASS CO. DETROIT.
DETROIT, May 15, 1895.

Sold to Charles F. Graulich, Agt.:
4 P. P. 20x68
4 P. P. 17x105
3 P. P. 62x105
1 P. P. 74x105 ..... $201 43

Filed June 21, 1895.
W. C. HARRIS, Clerk.

He obtained a judgment for $70. Upon the trial at circuit, the court allowed an amendment to the declaration by adding a special count for a breach of contract in refusing to accept and pay for the items mentioned in the bill of particulars, and a verdict and judgment followed



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upon this theory solely. The amendment was made and evidence admitted against objection and exception by counsel for defendant. The case is within the rule stated in the case of *Loranger* v. *Davidson*, 110 Mich. 605.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

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113 66
d123 491

DEGEN *v.* MANISTEE, FILER CITY & EAST LAKE RAILWAY CO.

CONTRACT OF EMPLOYMENT—INSUBORDINATION—DISCHARGE.

The refusal of a street-railway superintendent to obey the instructions of the president of the company, to whom the management of its affairs has been intrusted, constitutes a breach of his agreement to perform such duties as might be required of him by the company, and justifies his discharge.

Error to Manistee; McMahon, J. Submitted April 28, 1897. Decided May 25, 1897.

*Assumpsit* by Nat E. Degen against the Manistee, Filer City & East Lake Railway Company for the breach of a contract of employment. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*McAlvay & Grant*, for appellant.

*Dovel & Smith*, for appellee.

LONG, C. J. Plaintiff entered into a written agreement with defendant on February 27, 1893. The agreement was to continue at least one year from June 1st, thereafter, at the rate of $1,000 per year up to June 1, 1893, and after that date at the rate of $1,200 per year.

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It could by its terms be terminated by either party by giving 60 days' notice. It contained the following stipulations:

"The conditions of this agreement are as follows: The party of the first part hereby agrees to enter into the employment of the party of the second part as superintendent of its lines of electric street railway in Manistee, Michigan, and perform such duties as may be required of him by said second party; hereby agreeing to give his entire time, labor, and attention to such employment."

Mr. G. A. Hart was the president of the defendant company, and made the contract with plaintiff, signing it as president. No one gave plaintiff any orders, except Mr. Hart. Plaintiff commenced work on March 13th, and was discharged by Mr. Hart on October 23d following. Plaintiff claims that he was illegally discharged, and brings this action to recover for the balance of the time. On the trial the court directed verdict in favor of defendant. Plaintiff brings error.

It appears that some fault was found with plaintiff by Mr. Hart at different times, in that he could not find plaintiff when he wanted him. About September 28th, plaintiff went away to the World's Fair, with permission of defendant, and returned about October 10th. By permission of Mr. Hart, he then went to Milwaukee for a few days, to attend a street-railway convention. When he left he made arrangements for the proper management of his business, leaving the foreman at the power house in charge. During his absence, Mr. Hart assumed the management of the business. On the plaintiff's return from Milwaukee, he found that Mr. Hart had made some changes. He had made a new arrangement on what is called the "bulletin board,"—made changes in the schedule of the men. This the plaintiff, on his arrival, at once wiped off the board, made a new schedule, and put another man in place of a man whom Mr. Hart had put on. The next morning, when Mr. Hart came, he asked the plaintiff why he took off the man he put on. Plain-

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tiff told him the other man was entitled to the run. On being asked if he would reinstate the man whom Mr. Hart had put on, he refused. Some altercation took place; Mr. Hart insisting that his man should go back, and the plaintiff refusing to comply with his orders. The plaintiff then said:

"As long as you hold me responsible for the conduct of the men, I want you to understand that I will boss them. I will hire them, and I will discharge them, and not you; and, if today is the last day I am superintendent, today, at any rate, this man will not be put back to a regular run."

He was asked again by Mr. Hart to put the man back, and refused, when Mr. Hart told him he would take charge. The court stated, in determining the case, that the plaintiff was rightfully discharged for insubordination.

There was no substantial dispute or contradiction between the plaintiff and Mr. Hart as to what took place, and what is here stated is taken from plaintiff's own version of the affair. We are satisfied that the court below was not in error in holding, under the circumstances, that the plaintiff was properly discharged, and no recovery could be had. Mr. Hart was the president of the company. He had charge of all its affairs. He made the contract on behalf of the company with the plaintiff. Evidently he was the only one connected with the company who had supervision of the works. The company had intrusted to him the management, and the plaintiff had taken his orders from him up to that time, and under the contract he was "to perform such duties as may be required of him by said second party." Mr. Hart was the agent of the second party, and with full power to act for it. The rule is that the neglect or refusal of an employé to obey the directions of the employer as to the manner of performing his work is a breach of the contract

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which justifies his discharge. *Matthews* v. *Park Bros. & Co.*, 159 Pa. St. 579; *Child* v. *Manufacturing Co.*, 72 Mich. 623.

The judgment is affirmed.

The other Justices concurred.

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## McDOUGALL v. LAMB.

1. GARNISHMENT — DEFENSES — INTERVENTION OF PRINCIPAL DEFENDANT.

   The principal defendant has the right, at least in the absence of objection by the garnishee, to intervene in garnishment proceedings, and urge the exemption of the garnished fund.

2. JUSTICES OF THE PEACE—RETURN TO CERTIORARI—WHAT CONSIDERED.

   On *certiorari* to a justice of the peace, an amplification of the return, duly signed, accompanying the return proper and in no way inconsistent therewith, purporting to contain a minute of proofs offered and excluded, is entitled to the same consideration as if incorporated in the return.

Error to Lapeer; Moore, J. Submitted April 28, 1897. Decided May 25, 1897.

Garnishment proceedings in justice's court by Randolph A. McDougall against John J. Lamb, garnishee of William Mott. A judgment for plaintiff was reversed in the circuit court on *certiorari*, and plaintiff brings error. Affirmed.

*C. F. Gates*, for appellant.

*Crane & Crane*, for appellees.

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HOOKER, J. McDougall brought an action of *assumpsit* against Mott, and garnishee proceedings against Lamb, in justice's court. The disclosure, duly filed, shows Lamb indebted to Mott in the sum of $60. Judgment being rendered against Mott, the garnishee, Lamb, was cited to show cause why judgment should not be rendered against him, and issue was joined between him and the plaintiff. Upon the trial of this issue, Mott, the principal defendant, asked to be allowed to introduce evidence against the claim of the plaintiff, but was not permitted to do so. Upon *certiorari* the circuit court reversed the judgment, and the plaintiff has brought the case to this court by writ of error.

Whether the principal defendant has a legal right to intervene, against the consent of the garnishee, in garnishment proceedings, need not be determined upon this record, as it does not appear that any objection was made by the garnishee to such showing by the prinicpal debtor as he might choose to make upon the statutory issue. We have held that it is unsafe for a garnishee to omit from his disclosure any fact known to him, or which he may have reason to believe, which would tend to show that the fund or property in his hands was not subject to garnishment. The case of *Crisp* v. *Railway Co.*, 98 Mich. 648, intimates that the garnishee must see that money covered by the laborer's exemption be not recovered from him by garnishment proceedings without the consent or estoppel of the principal defendant. In *Wilson* v. *Bartholomew*, 45 Mich. 41, it was held that a principal defendant might review garnishment proceedings upon *certiorari*, where his rights had been cut off without his having an opportunity for a hearing upon the claim of exemption. While this case may be thought to imply that a principal defendant is not a party in the garnishee proceedings to the extent of permitting him to be heard, there is good reason for saying that a court should allow him to assume the defense of the garnishee, and we do not wish to be understood as saying that he

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has not a right to make such defense. Upon this subject, see 2 Shinn on Garnishment, sections 664, 671, *et seq.*, for a discussion of the subject, and 2 Howell's Annotated Statutes, section 8040, which seems to permit a trial of the question of the garnishee's liability, which might subject him to a double liability if the principal defendant cannot be brought before the court and bound by the judgment. The learned circuit judge was of the opinion that the justice erred in not allowing the defense to be made, and his judgment reversing the case must be affirmed, unless, as counsel for the plaintiff contends, the record shows that the proof offered could not have amounted to a legal defense.

The alleged defense is that the garnishee was indebted for hay sold to him by Mott, which hay was mortgaged to one Day; that the hay was sold by Mott, by consent of the mortgagee, upon his promise to pay the money to be received therefor to the mortgagee. Counsel appears to concede that, if this was true, it was a defense to the extent of the mortgage lien, but he asserts that the record fails to show that the defendant sought to prove this, but that his claim as made is shown by the following:

"The garnishee defendant, by his attorney, stated that he had no defense. Then Mr. Crane, as attorney for William Mott, requested to have William Mott sworn, that he might show by William Mott that the money due from John J. Lamb to the said William Mott was for hay sold the said John J. Lamb by said William Mott, and that said hay was exempt property, for the reason that the said William Mott had the said piece of land under contract, and he needed the proceeds of said hay to pay for said land, and that, consequently, said hay was exempt, and the proceeds thereof were not subject to garnishment; and also that one William Day had a mortgage on said hay, but that said Day had consented that he sell said hay,—which tender of testimony was objected to by the plaintiff, by his said attorney, which objection was sustained by me."

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The foregoing is all that appears from the return proper, but accompanying the return, and signed by the justice, are what purport to be minutes of testimony, giving the history of the proceeding, in which the claim made by the defendant appears. These minutes are returned with the other papers. It does not appear that any motion was made to strike them from the files as no part of the return, or that they were in any other way questioned. They are not inconsistent with the return, being only more full in their statement in some respects. Upon the whole record as returned by the justice, we are of the opinion that the circuit judge was justified in reversing the judgment. His judgment is therefore affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. MOORE, J., did not sit.

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## PERKINS *v.* CANINE.

REFORMATION OF DEED—MISTAKE—NOTICE.

A grantee, through mesne conveyances from the owner of a quarter section, of a parcel described in the deeds in the chain of title as the east half of the quarter section, is entitled to a reformation of the deeds, and a conveyance of sufficient of the land which, according to the governmental line, belongs to the west half, to make up the amount by which the east half falls short of 80 acres, where it was the original intention to convey the full 80 acres, and the owner of the west half was aware of such intention when he purchased, and such land has for years been in the actual possession of such grantee without objection.

Appeal from Washtenaw; Kinne, J. Submitted April 29, 1897. Decided May 25, 1897.

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Bill by Anna M. Perkins against Aaron H. Canine to reform a deed. From a decree for complainant, defendant appeals. Affirmed.

Complainant, by warranty deed executed February 5, 1894, obtained the title to E. ½ of N. W. ¼ section 14, township 4 S., range 6 E. She obtained her title by mesne conveyances from one William W. Wallace, who in 1884 was also the owner of the adjoining land, described as the W. ½ of N. W. ¼ of said section. The east half of the quarter did not contain 80 acres, but fell short about six acres. In April, 1884, Wallace contracted to sell to one Rogers "80 acres, being the E. ½ of N. W. ¼ Sec. 14, T. 4 S., R. 6 E." Both parties understood that the governmental description did not contain 80 acres. They therefore measured from the east side of the land west 80 rods, so as to include the amount of land to be conveyed. This made the west line of the lot conveyed six rods west of the surveyed line between the two governmental descriptions. Stakes were stuck on each side, and the line established by sighting through. Shortly after the contract was made, Wallace executed a deed to Rogers, in which the land was described by the governmental subdivision, and of course did not include the six acres of the west half. This is claimed to have been the mistake of the conveyancer, which mistake has been continued in the subsequent conveyances. Mr. Wallace, April 28, 1891, sold the west half by the governmental description, without reserving the six acres, to one Stevens, and Stevens sold by the same description to defendant March 28, 1894. No dispute arose until after defendant purchased, when he laid claim to this six acres which was included in this deed, and attempted to interfere with the possession of complainant. She thereupon filed this bill to correct her deed and compel defendant to convey the land to her. Her claim was sustained by the decree.

*A. J. Sawyer*, for complainant.

*Lawrence & Butterfield*, for defendant.

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GRANT, J. (*after stating the facts*). The defendant introduced no testimony except his deeds. We think it established by the evidence that these six acres were sold to Rogers, were intended to be included in the deed from Wallace to him, and that they were left out of the deed by mistake. Nothing occurred to call the attention of the various owners to the mistake until defendant claimed the title. For 10 years the parties had kept up a well-marked line between the two parcels, and complainant and her grantors had cultivated the land in dispute and been in possession of it. There does not appear to have been any dispute as to the location of the line established by the governmental survey. There is evidence to show that Stevens and defendant purchased with knowledge of the claim of Rogers and his grantees, and neither denies it. Defendant paid Stevens $550 for the land, and Stevens gave him a warranty deed. When this suit was commenced, defendant notified Stevens to defend it, and they settled by Stevens' paying him $150. Without stating more fully the testimony, we think the decree was correct.

This is not the question of the settlement of a boundary line, within the rule in *Kilgannon* v. *Jenkinson*, 51 Mich. 240. It is a question as to a mistake in the deeds.

Decree affirmed, with costs.

The other Justices concurred.

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## EIPPER v. BENNER.[1]

1. TRUSTS—ESTATES OF DECEDENTS.
V., after the death of his wife, in order to avoid suit for an accounting in the interest of certain of her heirs, admitted in writing that he had received funds from her to a specified amount, which amount he thereby agreed, pursuant to a confessed understanding with the wife, to bequeath to such heirs. Thereafter V. made a will which was in substantial conformity with his engagement, but such will was destroyed before his death. *Held*, that there was a declaration of trust, entitling the beneficiaries to an allowance of their claim against the estate.

2. SAME—STATUTE OF FRAUDS.
An admission in writing of the existence of a trust resting in parol is sufficient to satisfy the statute of frauds.

3. SAME—PERSONALTY.
The statute of frauds does not apply to a trust in personal property.

Error to Calhoun; Smith, J. Submitted April 29, 1897. Decided May 25, 1897.

Mary Eipper and Julius Nagel presented a claim against the estate of Chris Fred Vogel, deceased, for money alleged to have been held in trust for them. The claim was allowed by the probate judge, acting as commissioner, and Mary E. Benner, administratrix of the estate, appealed to the circuit court. From a judgment disallowing the claim, claimants bring error. Reversed.

*Herbert E. Winsor*, for appellants.

*John E. Foley* (*Taggart, Knappen & Denison*, of counsel on application for rehearing), for appellee.

[1] Rehearing denied July 16, 1897.

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HOOKER, J. In a proceeding before the probate judge of Calhoun county, acting as commissioner, the claim of the claimants was allowed. Upon appeal the circuit judge reversed the case, and disallowed the claim. His finding states the facts, and is given in full:

"(1) Claimants are nephew and niece of Mary Vogel, who was the wife of Chris Fred Vogel, deceased. Julius was born in May, 1866, and his sister, Mary, is about two years younger. They are the children of a deceased brother of Mary Vogel, and were left orphans in the State of Mississippi, but at what time is not disclosed by the proof, but at a time prior to their coming into the family of Chris Fred Vogel. Mary Vogel learned of the death of her sister, and that these children were orphans, and took steps to find them, and bring them North, into her family, and did find them, and they lived in the family of herself and husband about six years before her death.

"(2) Claimants had no property, and Mr. and Mrs. Vogel were at some expense in finding them and removing them to their home.

"(3) They were cared for and looked after by the Vogels as members of the family from the time they came into the family; worked out part of the time, and attended school, but not to any great extent.

"(4) At the time of the marriage of Mr. and Mrs. Vogel, he was a widower with one child, who is now living, and in whose interest this claim is contested. Mrs. Vogel was a widow without children, and died childless.

"(5) At the time of the marriage, Mrs. Vogel had several hundred dollars of property in her own right, consisting of moneys out at interest, and houses and lots in Coldwater, Michigan, where she lived. Mr. Vogel had some property, and they accumulated some by their labor, and in the management of what they had. They used their property for the joint interest of both in the care of the family, but investments were made in the name of Mr. Vogel.

"(6) Mrs. Vogel died April 21, 1887, and Gottlieb Kast was appointed her administrator, and proceeded to settle up her estate. It was appraised at the sum of one thousand eight hundred and eighteen ($1,818) dollars, and consisted principally of real estate owned by her at the

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time of her marriage. The estate was duly closed in probate court, and distributed to her legal heirs, under an order of distribution made by Hon. George Ingersoll, Judge of Probate.

"(7) The heirs at law of Mary Vogel were these claimants, children of a deceased brother, Michael Nagel, a brother, a brother in Germany, a brother in Ohio, and eight or nine children, who were the children of a deceased sister in Germany.

"(8) A day or two after her death, her brother, Michael Nagel, talked with Mr. Vogel about the property of his wife and the relations pertaining to the same as between Mr. and Mrs. Vogel. It is claimed that this talk was in the interest of claimants. Claimants knew nothing of the talk, and had no part in it. Michael was not their legally-appointed guardian, nor was he in any way authorized by them, or by any one, to make any arrangement regarding their interest in the estate of Mrs. Vogel, but acted entirely of his own motives.

"(9) In pursuance of this talk, and before Michael went home, the parties went to the probate court, and Judge Ingersoll, the probate judge of Calhoun county, prepared a paper, which Mr. Vogel signed, and which was in words and figures as follows:

"'*Memoranda* of unsettled matters between Chris Fred Vogel and the estate of Mary M. Vogel, his wife, as follows: Said Chris Fred Vogel has heretofore received from said Mary M. Vogel the following sums of money, to wit:

| | |
|---|---|
| One sum of three hundred dollars | ( $300 00) |
| One sum of three hundred and fifty dollars | ( 350 00) |
| One sum of three hundred and seventy-five dollars | ( 375 00) |
| And one sum of fourteen hundred dollars | ( 1,400 00) |
| Amounting in all to twenty-four hundred and twenty-five dollars | ($2,425 00) |

—And out of which he paid, at the request of said Mary M. Vogel, one hundred dollars for the benefit of Gottlieb Grimmer, and which leaves a balance of twenty-three hundred and twenty-five dollars ($2,325), and which amount I agree, in pursuance of my understanding with my said wife, to bequeath by my will to Julius Nagel and

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Maggie Nagel, minors, now members of the family of Chris Fred Vogel.

"'Dated, Marshall, April 27, 1887.

"'CHRIS FRED VOGEL.

"'In presence of George Ingersoll.'

"This paper was left with Judge Ingersoll, and remained with him till after the death of Mr. Vogel.

"(10) January 31, 1889, Chris Fred Vogel, on petition of Julius Nagel, and while Mr. Kast was acting as administrator of Mrs. Vogel's estate, was cited into probate court to testify as to the property he had belonging to his deceased wife's estate. This examination was in writing before the judge of probate, and was conducted by Hon. John C. Patterson, who represented Mr. Nagel. In this examination he denied owing his wife anything. He admitted he had considerable money, and in fact the amounts set forth in the memorandum, but claimed it had been paid out in various ways at her request. He also denied to Mr. Kast, while he was the administrator of Mrs. Vogel's estate, any liability to her estate or to claimants.

"(11) In December, 1894, Mr. Vogel made a will, in which Julius and Mary, these claimants, were remembered substantially as was set forth they should be in the memorandum made by Judge Ingersoll. The contents of this will rests somewhat in memory and hearsay, and, while not in the exact terms of the memorandum, was as favorable to them as the terms of it would have been.

"(12) This will was destroyed some time after its execution, and was not in existence at the death of Mr. Vogel.

"(13) Mr. Vogel died July 13, 1895, without a will, leaving as his only heir his daughter, Elizabeth. Administration was granted to his daughter. His property was appraised at six thousand five hundred and ninety-seven dollars ($6,597).

"(14) Claimants file a claim against his estate, which was the memorandum set forth in the ninth finding of fact herein, and to which was attached the following:

MARSHALL, MICH., Nov. 13, 1895.

Estate of CHRIS FRED VOGEL, Dr.,

To JULIUS NAGEL and MARY NAGEL EIPPER.

To the above claim.....$2,425 00

Interest to date if allowed.

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"Law.

"Claimants have no legal claim against the estate of Chris Fred Vogel, and cannot recover. It should be certified back to the probate court for Calhoun county that this claim is disallowed, with costs to be taxed.

"Dated August 15, 1896.

"CLEMENT SMITH, Circuit Judge."

The only question that seems to be raised by the brief of appellants goes to the merits,—can the order be sustained upon the finding of fact? The finding conclusively shows that Chris Fred Vogel unqualifiedly admitted in a most solemn manner that he had money belonging to his wife to the amount of $2,425, and that he had an understanding with his wife, before her death, that he was to bequeath it to the claimants, who were her nephew and niece. Not only does it appear that he admitted that he made this promise, but that he made the writing in which the admission appears as a means of avoiding an accounting for this property belonging to his wife at a time when her brother, one of her heirs, required it as a condition that the heirs should not compel such accounting; and it was shown that he made a will substantially in accordance with his admitted promise, which was destroyed some time after its execution, and before his death. The circuit judge was of the opinion that the admission of an "understanding" with his wife was not the admission of a promise, and that, if it can be said to amount to a promise, it was not based upon a consideration, because neither Mr. nor Mrs. Vogel was under any obligation to the claimants which would amount to a valid consideration. It is clear that the judge found that Vogel admitted that he had the sum claimed of his wife's property, and that he had promised her to leave it to these children at his death. We are of the opinion that the facts found show that Vogel held this money in trust for these children by arrangement with his wife, and after his death it was the duty of the administrator to pay it over to them, upon allowance by the probate court. *People* v. *Wayne Circuit Court*, 11 Mich. 393, 404 (83 Am. Dec. 754);

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*Wheeler* v. *Arnold*, 30 Mich. 304; *Nester* v. *Ross' Estate*, 98 Mich. 200; *Frank* v. *Morley's Estate*, 106 Mich. 635.

This trust, though it be said that it rested in parol, was admitted in writing, which was sufficient to satisfy the statute of frauds. *Patton* v. *Chamberlain*, 44 Mich. 5. But it would seem that the statute of frauds has no application, inasmuch as the trust fund was personalty. *Bostwick* v. *Mahaffy*, 48 Mich. 342; *Calder* v. *Moran*, 49 Mich. 14; *Chadwick* v. *Chadwick*, 59 Mich. 87; *Bowker* v. *Johnson*, 17 Mich. 42; *Penny* v. *Croul*, 76 Mich. 471.

The order of the circuit judge is reversed, and that of the probate court affirmed, with costs of both courts to the claimants against the estate. It will be so certified to the circuit and probate courts.

The other Justices concurred.

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## PEOPLE *v.* ABELL.

CRIMINAL LAW—OFFER OF INCOMPETENT PROOF—PREJUDICIAL REMARKS.

Upon the trial of a druggist for an unlawful sale of intoxicating liquors, the prosecuting attorney offered to show that the complaining witness, who claimed to have procured the liquor, immediately thereafter related the circumstances to a third person, whom he proposed to call for the purpose of showing that the sale occurred at the time charged in the information. Upon objection to the statement of the proposed testimony in the presence of the jury, the court ruled that it was the right of counsel to state to the court what he proposed to prove, but that the jury should disregard his statement, and declared the testimony inadmissible for the reason that the name of the proposed witness was not indorsed on the information. The only testimony to support a conviction was

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that of the complaining witness; that of the respondent and of the only other person claimed to have been present being in direct denial. *Held*, that the remarks were, under the circumstances, prejudicial to the respondent.

Exceptions before judgment from Van Buren; Buck, J. Submitted April 29, 1897. Decided May 25, 1897.

Charles E. Abell, a druggist, was convicted of violating the local option law. Reversed.

*Osborn, Mills & Master*, for appellant.

*James E. Chandler*, Prosecuting Attorney, for the people.

LONG, C. J. Respondent is a druggist. He was charged with the offense of selling two drinks of whisky, to be used as a beverage, and on trial before a jury was convicted. The whisky, it was claimed, was sold to Willard E. Symonds. He testified on cross-examination that he went into respondent's store for the purpose of getting him to make the sale, so that he could make the complaint. In speaking of the date when the whisky was sold, the witness stated that he was trusting entirely to his memory. He added: "I know I went over to Mr. Hopkins' office, and told him then what I was going to do, and I know I went back directly afterwards, and told what I had done." The witness further stated that Mr. Hopkins was a member of the Law and Order League. The prosecuting attorney thereupon stated, "In view of the cross-examination, I will call Mr. Hopkins." He was asked if Mr. Hopkins' name was on the information, and admitted that it was not. The respondent's counsel objected to his being called, whereupon the prosecuting attorney stated: "I simply want to show that this witness went to him on the 3d day of February, and related what he has told counsel, on the 3d day of February,—what he told him." Counsel for respondent excepted to



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this statement in the presence of the jury. The court thereupon said:

"Counsel would have a right to state what he proposed to prove. The jury, of course, will not pay any attention to it. It is not for the jury, but is entirely for the hearing of the court. The jury should disregard any statement of the kind. I think it would be objectionable to call him in view of the fact that his name is not on the information."

This is claimed to be error prejudicial to the rights of the respondent.

In this contention we think counsel are correct. Mr. Symonds had testified that, when the liquor was sold, one Samuel W. Bowerman was with him, and drank one glass of whisky, which witness ordered. Mr. Bowerman was called by the people, and denied emphatically that any such thing took place as described by Symonds, or that he took a drink of whisky there with him. The prosecution made an offer to bolster up the testimony of Symonds by showing that Symonds went to Hopkins, and told him what he testified to in court as to the purchase of the whisky. This testimony was wholly incompetent, but a statement that it was a fact was permitted by the court to be made by the prosecuting attorney. When the attention of the court was called to it by counsel for respondent, the response by the court was that counsel had a right to state what he proposed to prove, but it would be objectionable to call the witness, because his name was not on the information. The fact was thus presented to the jury by the statement of the prosecuting attorney that Hopkins would, if called, testify as claimed. Symonds was the only witness who testified to the sale's being made, and Mr. Bowerman and respondent both contradicted him flatly that any sale was made at all. While the jury were told that the statement was made for the benefit of the court, and they should disregard it, yet it may well be imagined that such a statement coming from the court would have its effect with them, especially

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when the only reason given by the court for not receiving the testimony was that Mr. Hopkins' name was not indorsed on the information.

Some other errors are claimed, but we do not regard them of sufficient importance to discuss. For the error pointed out, the verdict must be reversed, and a new trial ordered.

The other Justices concurred.

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## PEOPLE v. COLE.

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1. BASTARDY—NATURE OF PROCEEDINGS—AMENDMENTS.
Bastardy proceedings are so far civil in their character that they come within the general statute of amendments.

2. SAME—EVIDENCE—PHYSICIANS—PRIVILEGED COMMUNICATIONS.
The statement of the prosecutrix in a bastardy proceeding, to her physician, as to the paternity of her child, is not within the scope of 2 How. Stat. § 7516, prohibiting the disclosure of any information acquired by an attending physician which was necessary to enable him to prescribe for his patient as a physician, or to do any act for him as a surgeon.

*Certiorari* to St. Clair; Vance, J. Submitted April 29, 1897. Decided May 25, 1897.

Isaac Cole was convicted of bastardy. Reversed.

The respondent was convicted of bastardy upon complaint of one Stella Jordan. In her complaint she alleged that "he did beget her with child in the town of Ft. Gratiot, in the county of St. Clair, on or about the 19th day of August, A. D. 1895, at the home of the father of said Stella Jordan." At the examination before the justice, the respondent introduced testimony to show that he

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was not at the home of her father on the day in question. It does not appear that she was sworn on the examination, or that any effort was then made to change the date and time fixed in the complaint. He was bound over to the circuit court, and upon the trial there evidence was offered to show that the act of intercourse resulting in the pregnancy took place on the 21st of August, 1895, "while driving on the road between Lakeport and her home." To this counsel for the respondent objected, and denied the jurisdiction of the court to allow testimony, or to allow an amendment to the complaint, fixing any other date than the 19th, or any other place than her father's home. The counsel for the people asked leave to amend, if necessary, but stated that he did not consider an amendment necessary. The court admitted the testimony as to the changed time and place. The prosecuting officer stated that the mistake had been made by him in fixing the time and place in the complaint, that the girl told him that she was then living at home, and that the act occurred while she was living at her father's house. While no amendment was in fact made, the court returns that he supposed it was made.

*Thomas H. Murphy*, for appellant.

*Fred A. Maynard*, Attorney General, and *Joseph Walsh*, Prosecuting Attorney, for the people.

GRANT, J. (*after stating the facts*). 1. These proceedings are not criminal in their character. It was held in *Sutfin* v. *People*, 43 Mich. 37, that "they are partly for the benefit of the complainant, and may be instituted in her name, and partly for the purpose of indemnifying the public, and may be instituted in the name of the people." In *Hamilton* v. *People*, 46 Mich. 186, three different dates were fixed, a month apart, and the complaint was held good. It was said in *People* v. *Harty*, 49 Mich. 490, that "bastardy proceedings are not, in this State, criminal in any correct sense, and they do not recognize the matter

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they deal with as a crime or misdemeanor." It was therefore held in that case that the superior court of Grand Rapids obtained no jurisdiction over a proceeding for bastardy, because it did not fall under the title "Crimes, Misdemeanors, or Offenses." It must therefore be held that these proceedings are so far civil in their character that they come within the general statute of amendments, and that the time and place may be amended, provided opportunity is given to the respondent to meet them. This case is distinguishable from *Hull* v. *People*, 41 Mich. 167. In that case the time and place were fixed with particularity, and the reasons given in the complaint for so fixing them. The complainant upon the trial was permitted to fix another time, several weeks earlier, in another place and under different circumstances. It is unnecessary to determine whether this amendment was considered as made, or whether it may be treated now as made, since the case must be reversed upon another point, and the amendment may be made upon a new trial.

2. 2 How. Stat. § 7516, prohibits a disclosure of any information acquired by any attending physician, "which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." The attending physician was asked if Miss Jordan told him who was the father of her child. This was ruled out as a confidential communication, within the prohibition of the statute. This information was not necessary to enable the physician to prescribe for her, and the testimony was therefore admissible. *Campau* v. *North*, 39 Mich. 606 (33 Am. Rep. 433).

Judgment reversed, and a new trial ordered.

The other Justices concurred.

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## PEOPLE *v.* SNOWBERGER.

1. ADULTERATION OF FOOD—STATUTORY OFFENSES—INTENT—POLICE POWER.

It is competent for the legislature, under the police power, to provide for the protection of the public health by making it an offense punishable by fine and imprisonment to sell adulterated food or drink, irrespective of the seller's knowledge of the adulteration.

2. SAME.

Act No. 193, Pub. Acts 1895, prohibits the manufacture or sale of adulterated articles of food or drink, and prescribes what shall be deemed adulteration within the meaning of the act. Section 8 forbids any person from *knowingly* offering for sale cheese which is falsely labeled; this being the only case in which knowledge is expressly made an element of an offense designated by such statute. *Held*, that proof of guilty knowledge or intent is not essential to the conviction of one who sells adulterated food.

Exceptions before judgment from Monroe; Kinne, J. Submitted April 29, 1897. Decided May 25, 1897.

Michael Snowberger was convicted of selling adulterated food, in violation of Act No. 193, Public Acts of 1895. Conviction affirmed.

*William Look* and *Ira G. Humphrey* (*Bowen, Douglas & Whiting*, of counsel), for appellant.

*Willis Baldwin*, Prosecuting Attorney, for the people.

LONG, C. J. Respondent was convicted under an information charging that—

"On the 19th day of April, A. D. 1897, at the city of Monroe, and in the county aforesaid, Michael Snowberger did offer for sale, and sell, to Carl Franke, an adulterated article of food, to wit, a quantity of mustard, to wit, a quarter of a pound, colored and adulterated with tumeric,

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whereby the said mustard, as an article of food, was damaged, and its inferiority concealed, and whereby it was made to appear of better and of greater value than it really was, the same not being a mixture or compound recognized as ordinary articles or ingredients of articles of food, contrary to the form of the statute in such case made and provided," etc.

The information was filed under Act No. 193, Pub. Acts 1895, entitled "An act to prohibit and prevent adulteration, fraud, and deception in the manufacture and sale of articles of food and drink." The act provides:

Section 1: "No person shall, within this State, manufacture for sale, offer for sale, or sell any article of food which is adulterated, within the meaning of this act."

Section 2: "The term 'food,' as used herein, shall include all articles used for food or drink, or intended to be eaten or drunk by man, whether simple, mixed, or compound."

Section 3: "An article shall be deemed to be adulterated, within the meaning of this act: *One*, if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength, or purity; *two*, if any inferior or cheaper substance or substances have been substituted wholly or in part for it; *three*, if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; *four*, if it is sold under the name of another article; *five*, if it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted, or rotten animal or vegetable substance or article, whether manufactured or not, or, in case of milk, if it is the product of a diseased animal; *six*, if it is colored, coated, polished, or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; *seven*, if it contains an added substance or ingredient which is poisonous or injurious to health: *Provided*, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, and are not injurious to health."

Section 19 makes any violation of the act a misdemeanor, and provides a penalty by a fine of not less than

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$100 nor more than $500, or by imprisonment in the county jail, etc.

On the trial, respondent admitted that on the 19th day of April, 1897, he, at the city of Monroe, this State, offered for sale, and did sell, to Carl Franke, a quantity of mustard, to wit, a quarter of a pound, which was afterwards found upon a chemical examination to be colored and adulterated with tumeric, whereby the said mustard, as an article of food, was damaged, and its inferiority concealed, and it was thereby made to appear of greater and better value than it really was; the same not being a mixture or compound recognized as an ordinary article or ingredient of articles of food. But he claimed that said article of mustard so sold was purchased by him as a pure article in good faith, and that he believed at the time of the purchase by him, and also at the time of the sale to the said Franke, that the same was pure mustard, free from any coloring and adulteration with tumeric or any other coloring or adulterant, and that no inferiority was concealed whereby it was made to appear of greater or better value than it really was; that, at the time he purchased the same, he asked for pure mustard, and that the same was warranted to him as pure; that he did not make or cause to have made a chemical examination of the same, and did not inform himself or endeavor to ascertain the methods of determining pure from impure mustards, but relied upon the representations of his vendor and the appearance of the article to the eye; and that he did not intend to violate the law. From such conviction, respondent appeals.

It is the contention of counsel for respondent that it was the intent of the legislature to provide by the act that no person should be convicted and punished for selling adulterated food or drink without showing that he knew the same to be adulterated; that the information does not charge such knowledge, and the proofs disclose that respondent acted in good faith, and in the belief that the article sold was pure and unadulterated. The act cannot

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be so construed. The offense under the act consists in selling an article intended to be eaten or drunk which is adulterated. Section 8 of the act shows conclusively that the legislature did not intend to make criminal intent or guilty knowledge a necessary ingredient of the offense.[1] As a rule, there can be no crime without a criminal intent; but this rule is not universal. In *People* v. *Roby*, 52 Mich. 577 (50 Am. Rep. 270), the respondent was convicted of the offense, under the statute, of keeping his saloon open on Sunday. It was there said:

"It is contended that, to constitute an offense under the section referred to (1 How. Stat. § 2274), there must be some evidence tending to show an intent on the part of the respondent to violate it. * * * The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon closed. As a rule, there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

Many cases are cited in that case where convictions were sustained although the element of guilty knowledge was lacking. Thus, in Massachusetts a person may be convicted of the crime of selling intoxicating liquor as a beverage, though he did not know it to be intoxicating (*Com.* v. *Boynton*, 2 Allen, 160); and of the offense of selling adulterated milk, though ignorant of its adulteration (*Com.* v. *Farren*, 9 Allen, 489; *Com.* v. *Nichols*, 10 Allen, 199; *Com.* v. *Waite*, 11 Allen, 264 [87 Am. Dec. 711]; *Com.* v. *Smith*, 103 Mass. 444). In Missouri a

[1] This section reads as follows: "No person shall knowingly offer, sell, or expose for sale, in any package, cheese which is falsely branded or labeled."

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magistrate may be liable to the penalty for performing the marriage ceremony for minors without consent of parents or guardians, though he may suppose them to be of the proper age. *Beckham* v. *Nacke*, 56 Mo. 546. Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction though the party was ignorant of the animal's age. *Com.* v. *Raymond*, 97 Mass. 567. In *People* v. *Welch*, 71 Mich. 548, this court, in speaking of *People* v. *Roby*, *supra*, said:

"When a statute does not make intent an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation;" citing *State* v. *Hartfiel*, 24 Wis. 60.

In the late case in this court of *Wolcott* v. *Judge of Superior Court*, 112 Mich. 311, the relator, as prosecuting attorney of the county, filed an information against one Fred Saunders, charging him with being engaged in selling liquor without giving the bond required by the statute. The bond was fair upon its face, but one of the sureties, it appears, was disqualified, under section 2283*d*1, 3 How. Stat. The information did not allege that respondent had knowledge of this defect in the bond. The information was quashed by the court below, and the relator asked the aid of *mandamus* to compel the respondent to reinstate the case. It was said by this court in the majority opinion:

"It was the intention of the legislature to make the execution and delivery of the prescribed bond a condition precedent to sale, and to require the person desiring to engage in the business mentioned to assume the responsibility of knowing that the bond, when presented, complies in all essential particulars with the law. He must know that his sureties are males; that they are resident freeholders of the township, village, or city in which the business is to be carried on; that they hold none of the offices prohibited by the act; and that, at the time the bond is filed, neither is a surety upon more than two bonds required by the act."

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It appeared that one of the sureties was already upon more than two bonds, and the writ was granted, compelling the respondent to reinstate the case. The case of *People* v. *Roby*, *supra*, was cited in that case in support of the proposition that intent was not an ingredient of the offense.

These regulations are under the police power of the State. Undoubtedly, it was competent for the legislature to prohibit the sale of adulterated articles of food and drink. The police power of the State extends to the protection of the health, as well as of the lives and property, of the citizens. Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of the citizen or interferes with his liberty, it is for the courts to determine whether it relates to and is appropriate to promote such public health. Under the police power, the conduct of individuals and the use of property may be regulated, so as to interfere to some extent with the freedom of the one and the enjoyment of the other. It cannot be doubted that the legislature intended by this act to protect the public against the harmful consequences of sales of adulterated food, and, to the end that its purpose might not be defeated, to require the seller, at his peril, to know that the article which he offers for sale is not adulterated. As was said by the supreme court of Ohio in *State* v. *Kelly*, 54 Ohio St. 166: "If this statute had imposed upon the State the burden of proving * * * his knowledge of its adulteration, it would thereby have defeated its declared purpose."

In *State* v. *Smith*, 10 R. I. 260, the court, in speaking of the offense of selling adulterated milk, said:

"Counsel for defendant asked the court to charge that there must be evidence of a guilty intent on the part of the defendant, and of a guilty knowledge, in order to convict him. Our statute, in that provision of it under which this indictment was found, does not essentially differ

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from the statute of Massachusetts; and there, previous to the enactment of our statute, the supreme court had determined that a person might be convicted although he had no knowledge of the adulteration, the intent of the legislature being that the seller of milk should take upon himself the risk of knowing that the article he offers for sale is not adulterated."

Statutes in many States have been passed providing that whoever sells, or keeps or offers for sale, adulterated milk, or milk to which water or other foreign substance has been added, shall be punished, etc. Under these statutes, it has been decided many times that the risk is upon the seller of knowing that the article he offers for sale is not adulterated, and that it is not necessary in an indictment under such a statute to allege or prove criminal intent or guilty knowledge. *Com.* v. *Smith*, 103 Mass. 444; *Com.* v. *Warren*, 160 Mass. 533; *People* v. *Cipperly*, 101 N. Y. 634. The same rule that no criminal intent is necessary has been held to apply under an act forbidding the sale of oleomargarine or other imitations of dairy products unless express notice be given to the purchaser. *Bayles* v. *Newton*, 50 N. J. Law, 549; *Com.* v. *Gray*, 150 Mass. 327. The English rule is in keeping with the doctrine in this country on this subject. *Roberts* v. *Egerton*, L. R. 9 Q. B. 494.

The statute not requiring knowledge on the part of the seller to make the offense complete, we are satisfied that the conviction must be sustained. No case has been cited, and we are not able to find one, where a contrary doctrine is laid down. The act may work hardship in many cases, but that question is one to be addressed to the legislature, and not to the courts. As we have said, it was within the power of the legislature to pass the act making it an offense punishable with fine and imprisonment to sell adulterated food or drink, although the person selling the same has no knowledge that it is adulterated. Under this statute, one making sales must do so at his peril.

The conviction is affirmed.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. GRANT, J., did not sit.

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## GODKIN v. OBENAUER.

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ESTOPPEL—INSPECTION OF LUMBER—NEGLIGENCE.

A lumberman who sells his lumber according to a certificate of inspection, after learning of a discrepancy between the actual measurement as shown by the certificate and his own estimate of the quantity of the lumber, cannot recover against the party who issued the certificate, upon the basis that his own estimate was correct and the certificate wrong.

Error to Bay; Maxwell, J. Submitted April 30, 1897. Decided May 25, 1897.

Assumpsit by John Godkin against Henry G. Obenauer and another for failure to make a proper inspection of plaintiff's lumber. From a judgment for defendants, plaintiff brings error. Affirmed.

Plaintiff was a lumberman, and had upon the docks at his mill in Schoolcraft county piles of lumber ready for shipment. It was the custom to sell lumber in Chicago according to the certificates of inspection as to both quality and amount. The defendants were known in Chicago as accurate and experienced inspectors. Plaintiff applied to them to inspect this lumber, which was to be shipped on two vessels. They informed him that they could not do it themselves, but would send a competent man, with certificates of inspection signed by them in blank, to be filled out by the inspector. They sent an inspector named Parish, a man of experience and skill. He inspected the lumber as it was transferred to the vessels, made out his certificates, delivered them to the plaintiff, who sent them to a commission merchant in Chicago, and the lumber was sold by him according to this inspection. Plaintiff and a man named Little made an estimate of this lumber upon the docks, which was

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greater than the amount as determined by Parish. Plaintiff brought this suit against the defendants, alleging negligence on their part, through their agent, Parish, in making the measurements. It is alleged that he "so negligently, carelessly, and unskillfully performed said service that he failed and omitted and neglected to inspect about 50,000 feet of lumber, and inspected as cull about 50,000 feet that, if properly inspected, was worth $13.15 per thousand, but under said inspection was so graded as to bring only about $7 per thousand." The case was submitted to the jury to determine between the estimate of plaintiff and the measurement of Parish. The jury found for the defendants.

*C. L. Collins*, for appellant.

*Porter & Haffey* (*De Vere Hall*, of counsel), for appellees.

GRANT, J. (*after stating the facts*). It would be necessary to discuss some of the assignments of error, provided the plaintiff had made such a case as should have been submitted to the jury. Counsel for the defendants contend that the alleged errors are immaterial, since the court should have directed a verdict. Counsel for the plaintiff contends that this question cannot be now raised, as the record does not contain all the testimony. We must hold that the record contains all the testimony under the following decisions: *Hitchcock* v. *Burgett*, 38 Mich. 508; *Ironwood Store Co.* v. *Harrison*, 75 Mich. 201. Whether or not this be so, the sole basis on which plaintiff asked to recover was the estimate. He introduced no testimony of actual measurement.

It appears that the first cargo contained 296,252 feet, and the second 201,671 feet. Before the first cargo was completed, Parish informed plaintiff that the lumber would not hold out according to his estimate. When the first cargo was loaded, Parish gave plaintiff a certificate of inspection, which he inclosed to his agent in Chicago,

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with directions to sell. He at the same time informed him that he would require a vessel to carry about 200,000 feet for the second cargo. Plaintiff telegraphed for a vessel to hold that amount, and, as already shown, the cargo amounted to a little over 200,000 feet. Plaintiff therefore knew of the discrepancy between the actual measurement and his estimate. He knew of this discrepancy before the first cargo was loaded. It was his duty to secure a second inspection if he desired to hold the defendants for damages. His estimate was not, and could not be, accurate. While the lumber was in his own control, and it was in his power to have it remeasured, he chose to sell it according to the certificates of inspection. Since he chose to act under the inspection and sell his lumber by it with full knowledge of all the facts, the law will not permit him to recover upon the basis that his estimate was correct and the actual measurement wrong. Some of these piles contained over 100 courses. The lumber was of various lengths from 12 to 16 feet, according to plaintiff's testimony, and, according to Little and Parish, from 10 to 18 feet. The estimate was made by taking from 5 to 7 courses, measuring the width of the boards in each course, estimating the average length, and thus determining the amount in these courses. The rest of the pile was estimated by the amount thus reached. It is true that plaintiff was so confident of the correctness of his estimate that he said: "From my experience, my estimates and inspection have varied sometimes; but I consider the measurement wrong, not my estimate." But he also testified that there would be some very heavy variations. "Sometimes there would be such a variation between my estimate and the shipment that I would have to stop them." He was not present at all the estimates, but his employé, Little, made some of them alone. He also said: "I estimated some of the piles, and Little and myself the others. Sometimes I made up my estimate on my judgment, Little on his judgment; and sometimes we then took the combined judgment of both of us. Some-

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times I might measure the boards while he might count the courses." It is unnecessary to further state the testimony. For the reason above given, the plaintiff was not entitled to recover, and the errors were therefore harmless.

Judgment affirmed.

The other Justices concurred.

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KINNEY *v.* ONSTED.

NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF PROPRIETOR.

The proprietor of a grain elevator is not liable for injuries to a customer occasioned by the giving way of a railing about an elevated platform, even though he had knowledge of its defective condition, where the customer, at the time of the accident, was putting the railing to a use other than that for which it was intended, by leaning against it for support.

Error to Lenawee; Lane, J. Submitted April 30, 1897. Decided May 25, 1897.

Case by George B. Daniels against John Onsted for personal injuries. There was a judgment for plaintiff, and defendant brought error. Plaintiff died pending the appeal, and the cause was revived in the name of his administrator, Frank D. Kinney. Judgment reversed.

*Salsbury & O'Mealey*, for appellant.

*Watts, Bean & Smith*, for appellee.

MONTGOMERY, J. This action was instituted by George B. Daniels in his lifetime, to recover damages sustained by reason of the alleged defective condition of the defendant's premises. The material facts in the

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case, as disclosed by the evidence, are that the defendant was the proprietor of a grain elevator, which consisted of a building 22 feet wide and 40 feet in length. On the south side of this building there is a bridge 12 feet in width, with an approach leading up to it at either end, of the same width. A pair of rolling doors, 7½ feet wide, open from about the center of the building onto this bridge or elevated platform. One means of approach to the office, which is in the elevator building, is to follow the driveway up to the platform, and across it, through these doors. Near the edge of this platform is a railing fastened to posts spiked to the sills of the bridge or platform. The posts are 4 by 4, with 2 by 6 pieces spiked lengthways on top. The railing is 3 feet high. In front of the rolling doors a space of 10 feet wide is left, where there is no railing, having been left out to facilitate the loading of heavy articles into farmers' wagons. The portion of the railing east of this opening is 20 feet long before the grade portion of the bridge is reached. On the west of the opening there is a railing 10 feet long, on the level part of the bridge, and another railing on the west grade, 8 feet in length. Farmers, in delivering grain to the elevator, drove onto the bridge, and, by means of a spout attached to the wagon, ran the grain into the hopper.

The testimony tends to show that, a few days prior to the injury to the plaintiff, there had been a runaway, and the railing had been damaged, the top piece being torn off from the posts, and the posts also weakened; that the railing had been straightened up in such manner that its appearance did not indicate its weakness to the casual observer. The plaintiff, on the day in question, started to go to the elevator to buy a load of corn of the defendant. He went onto the bridge from the west approach, well to the south side of the platform, and was passing in a northeasterly direction, to go through the rolling doors into the elevator building. If he had kept on in that direction,



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it would have brought him on the inside of the elevator, where his business with the proprietor was to be transacted; but it appears that at this time his son, Willis Daniels, and William Knapp, were on the bridge, unloading a load of wheat, and his son called to him, saying that he had some money for him. At that, plaintiff turned southeast, came up to the south side of the wagon, near the center, a distance of 15 or 16 feet, where his son was, and got the money. After he got it, he was talking with these two men a few minutes about the horses, and, while so talking, leaned against the railing, and it gave way, and he fell to the ground, and was injured. Upon this state of facts, the plaintiff recovered, and the defendant brings error, and contends that there is no case shown by the plaintiff's testimony entitling him to recover, and that the defendant was under no obligation to build a railing, or keep it in repair, for the plaintiff to lounge or sit upon or lean against. The plaintiff, on the other hand, contends that the case falls within the rule that where a party, expressly or by implication, invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.

This case is certainly near the dividing line. The rule is well settled that the owner or occupant of land is liable to those coming to it at his invitation, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land or the access to it, which is known to him and not to them, and which he has negligently suffered to exist. But this duty, it is held, does not extend so far as to make such an occupant responsible for the unsafe condition of those parts of his premises not intended for the reception of visitors or customers, and where they are not expected to go. See 1 Thomp. Neg. p. 308. Applying these rules to this case, it is clear that, if the plaintiff

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had suffered an injury from a defect in the floorway of the platform or bridge, or, possibly, if, by misadventure, he had stumbled and fallen against this defective railing, there would be ground for holding that the defendant was responsible for the injury. But the weakness of the plaintiff's case is that the defendant never invited him to enter upon his premises, and put the railing to the test of supporting his weight, by leaning or lounging against it.

The only cases in which a similar question has arisen, which have been called to our attention, are those of *Stickney* v. *City of Salem*, 3 Allen, 374, and *Orcutt* v. *Bridge Co.*, 53 Me. 500. In *Stickney* v. *City of Salem* the action was against the city for injuries resulting to deceased caused by leaning against a fence or railing which marked the terminus of a street, and was built upon the top of a sea wall. The deceased, in company with a friend, had walked to this point to view the sea, had turned his back to and leaned against this railing, which gave way, because of defects, and he received serious injuries. The court say:

"The fact that the railing was defective, and would have proved an insufficient barrier in case it became necessary for a traveler to use it for a legitimate object, is wholly immaterial. It is a sufficient answer to the plaintiff's case that the defendants were not bound to keep the railing in repair for the purpose for which it was used by the deceased at the time of the accident."

The case of *Orcutt* v. *Bridge Co.* is precisely analogous to that of *Stickney* v. *City of Salem*.

It is urged by plaintiff's counsel that a distinction exists between private premises and a public highway in this regard, and that the rule of care required of the highway authorities is based upon a different principle from that of private parties inviting persons upon their premises. We think, however, that this distinction cannot avail the plaintiff in this case. The invitation to the plaintiff was to do business in the elevator. The approach to the place of business was an elevated private way. It could not be

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expected any more by this defendant than by the city authorities of Salem in the case cited that this private way would be put to any other than the uses to which it was apparently adapted. Undoubtedly, in the case of a municipality or an individual maintaining a way, an injury resulting from a defect in the way itself, to one who stops to transact business, may be recovered for. But the weakness of the plaintiff's case arises from the fact that this railing was put to a use for which it was not intended, any more, in the present case, than were the railings in the cases cited from Massachusetts and Maine. Plaintiff's counsel concede that the defendant was under no obligation to build or keep the railing in repair for plaintiff to lounge or sit upon or lean against, but they contend that the defendant's liability arises out of his knowingly permitting a snare or trap, by leaving the railing in apparent good order, but in fact so defective that one was liable to receive injury from it. But, before it could become a snare or trap, it must be assumed that its apparent good condition was an invitation to make such a use of it as the plaintiff attempted. As we have seen, its presence was not an invitation to make that use of it.

We think there was no case for the jury, and that the judgment should be reversed, and no new trial ordered.

The other Justices concurred.

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## McMORRAN v. MOORE.

1. INSOLVENT DEBTORS—ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES.

An insolvent debtor deeded all of his real estate, except his homestead, to a firm to which he was indebted in a large amount, and at the same time executed to a member of the firm, as trustee for certain specified creditors, a chattel mortgage covering all of his personal property. This mortgage made no provision for the return of any surplus to the mortgagor. *Held*, that the instruments did not constitute an assignment for the benefit of creditors.

2. ATTACHMENT—DISSOLUTION—BURDEN OF PROOF.

Upon proceedings to dissolve an attachment, the plaintiff has the burden of showing, affirmatively, sufficient cause for issuing the writ, existing and continuing up to the time of the hearing of the application to dissolve.

3. SAME—ABSCONDING—MEANING OF TERM.

"Absconding," within the meaning of the attachment laws, means something more than a mere temporary absence for health. It involves the design to withdraw clandestinely, to hide or conceal one's self, for the purpose of avoiding legal proceedings.

4. FRAUDULENT CONVEYANCES—EVIDENCE.

The mere fact that a transfer or series of transfers by a debtor to his creditor will necessarily hinder or delay other creditors, or prevent the collection of their claims, does not render the same fraudulent as a matter of law.

5. ATTACHMENT—DISSOLUTION—EVIDENCE.

Although, to justify the issuance of a writ of attachment on the ground of a fraudulent disposition of property, the intent to defraud must have existed at the time the writ issued, the subsequent conduct of the parties may properly be considered, upon an application to dissolve the writ, for the purpose of throwing light upon such intent.

*Certiorari* to St. Clair; Vance, J. Submitted April 30, 1897. Decided May 25, 1897.

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Attachment proceedings by David McMorran and another against David Moore. Plaintiffs bring *certiorari* to review an order dissolving the writ. Reversed.

*Sparling, Law & Moore* (*H. W. Stevens*, of counsel), for appellants.

*Avery Bros. & Walsh* (*Phillips & Jenks*, of counsel), for appellee.

HOOKER, J. Upon application of the defendant, the circuit court dissolved an attachment, and the plaintiffs bring the case here for review upon the findings of the circuit judge. These are voluminous, and need not be incorporated in the opinion. The principal questions that counsel for the plaintiffs raise are:

*First.* That the findings show that certain instruments amount to a common-law assignment for the benefit of creditors, with a preference.

*Second.* That they constituted grounds for attachment.

In brief, the finding shows that the defendant, David Moore, was engaged in the mercantile business upon his own account at Port Huron. He was also an equal partner with his brother Thomas in a store at St. Clair, and both concerns were insolvent. On January 25, 1896, David Moore owed F. Saunders & Co. about $6,000, of which $622.85 was due from the partnership of T. & D. Moore. At the same time, David Moore owed the plaintiffs $1,386.02, and large sums to other creditors. On that day he executed to F. Saunders & Co. six warranty deeds and two quitclaim deeds, covering all of his real estate except his homestead (which was mortgaged), for an expressed total consideration of $4,100. On the same day, he and his wife executed to Dixon, a member of the firm of F. Saunders & Co., as trustee, a chattel mortgage covering all of his personal property, in trust for the security of certain creditors therein named. This mortgage made no provision for the return of any surplus to the mortgagor. When executed, these instruments were

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handed to Thomas Moore, and David and his wife started for New Mexico. Thomas delivered the deeds and mortgage three days later.

We think that these instruments should not be held to be an assignment for creditors with a preference. The omission from the mortgage of a provision for the return of a possible surplus did not make the transfer absolute. In *Austin* v. *First Nat. Bank*, 100 Mich. 618, an instrument without a defeasance was held a mortgage, and what was there said is applicable to this instrument. It is definitely settled in Michigan that a debtor has a lawful right to prefer a creditor, and that the courts are not alert to deprive him and the preferred creditor of their rights, where the intention of the debtor is manifest, and the instruments do not legally constitute an assignment, and there is an absence of fraud. See *Sheldon* v. *Mann*, 85 Mich. 265; *Warner* v. *Littlefield*, 89 Mich. 329; *National Bank of Oshkosh* v. *National Bank of Ironwood*, 100 Mich. 485. The discussion in these cases fully covers the subject.

It is further contended that the attachment should not have been dissolved, because the evidence showed that the transfers were fraudulent and that the defendant had absconded. In applications for the dissolution of attachment, the burden is on the plaintiff in attachment to show, affirmatively, sufficient cause for issuing the writ, existing and continuing up to the time of hearing of the application to dissolve. *Macumber* v. *Beam*, 22 Mich. 403; *Brown* v. *Blanchard*, 39 Mich. 790; *Folsom* v. *Teichner*, 27 Mich. 107. It therefore was necessary for the plaintiffs to convince the circuit court of the facts relied upon, viz., that the defendant had absconded to the injury of his creditors, or that he had fraudulently disposed of his property with intent to defraud his creditors, or one of the other causes set forth. The court found explicitly that David Moore, in going to New Mexico, did not abscond, but went for his health, intending to return; also, that the making of the deeds was not with an intent to hinder, delay, or defraud

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creditors. The finding of fact is quite full in respect to the minutiæ of the transaction. So far as it is necessary to find a specific intent, the conclusion of the circuit judge cannot be reviewed by us. "Absconding," in the eye of the law, means something more than a temporary absence for health. It involves a design to withdraw clandestinely, to hide or conceal one's self, for the purpose of avoiding legal proceedings. The court not only found an absence of such intent, but the facts found are consistent with the absence of such intent.

Upon the question of fraud we may say substantially the same. The facts found do not conclusively establish an intent to hinder, delay, or defraud creditors. Counsel assign error upon certain isolated facts, substantially asking us to say that such facts, in and of themselves, are grounds for attachment, for the reason, apparently, that they conclusively show an intent to defraud; such, for instance, as the "making and delivery of the eight deeds," the "including the partnership account in the chattel mortgage," and other things which need not be mentioned at length. Some of these were facts which collectively or singly might have led the court to find the presence of a fraudulent intent. But we cannot say that they conclusively show it. Nor can we say that they are necessarily grounds for attachment, unless we are to adopt plaintiffs' claim that where an act will necessarily hinder or delay creditors, or possibly prevent their collection of their claims, it is a legal fraud. Such a rule undoubtedly applies in some classes of cases, as where a voluntary conveyance is made, but we think it cannot be said of this case.

It seems that, after David Moore left, he executed another mortgage to Dixon, and consented to a sale of the partnership business. It also appeared that Dixon had not taken possession of the stock of goods under his mortgage up to the time of hearing, and that certain dealings were had with the property by T. Moore, the defendant's agent, by F. Saunders & Co.'s consent. The

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judge returns that he has "not considered the effect of this chattel mortgage, or the manner of dealing with the mortgaged property, for the reason that the facts justifying the issuance of the writ of attachment must exist at the time it issues, and not afterwards." While the intent to defraud must have existed at the time the writ issued, the subsequent conduct of the parties to the transaction was admissible to throw light upon the intent with which the instruments were made and accepted, and, had there been a jury, it would have been error to exclude them. The judge seems to have excluded them as immaterial to the issue. While we cannot say that they should have affected the result, we cannot say that they should not. It was the duty of the judge to consider them. Inasmuch as he did not, we have no alternative but to reverse the order of dissolution, with costs, and direct a new trial. Such an order is therefore made.

The other Justices concurred.

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## HINKLE v. COLLINS.

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1. APPEAL FROM JUSTICE'S COURT—DOCKET ENTRIES—CONCLUSIVENESS OF RETURN.

Defendants who take a special appeal from a justice's judgment, alleging as error that the docket entry, "judgment against defendant," does not indicate against which of the defendants judgment was rendered, are bound by an amended return, made at their request, whereby it appears that the judgment was against both.

2. SAME—NAMES OF PARTIES—INITIALS.

That a plaintiff in justice's court has a Christian name other than the initials by which he sues is not established, on special appeal, by the return of the justice to that effect, where there is nothing in the proceedings themselves from which the fact could be judicially ascertained.

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Error to Lenawee; Lane, J. Submitted April 30, 1897. Decided May 25, 1897.

Trover, in justice's court, by C. G. Hinkle against Horace M. Collins and Merritt Wing. There was a judgment for plaintiff, and, on special appeal to the circuit court, the proceedings were quashed. Plaintiff brings error. Reversed.

*J. C. Winne*, for appellant.

*John Riley* and *Watts, Bean & Smith*, for appellees.

LONG, C. J. This action was commenced in justice's court by summons issued in the name of C. G. Hinkle against H. M. Collins and Merritt Wing, doing business under the firm name of H. M. Collins & Co. The justice's docket shows that on the return day the parties appeared by their attorneys, and, security for costs being demanded, the same was given. The parties then agreed to an adjournment. On the adjourned day plaintiff appeared by his attorney. The docket then reads: "Defendant answered to his name by John Riley, his attorney." The docket further shows that plaintiff then produced witnesses, who were sworn and examined in the cause, and cross-examined by "defendant's counsel;" that "no evidence was offered on the part of the defendant, other than cross-questioning of plaintiff's witnesses. After hearing the testimony and arguments of parties, judgment was rendered forthwith by me against the defendant in favor of the plaintiff for the sum of $23.16 in damages, and $9.50 cost of suit." By special appeal the case was taken to the circuit court, the affidavit alleging as errors:

"1. That the justice, in entering the case on his docket, named plaintiff by his initials instead of his full name.

"2. That the justice, in rendering judgment against defendant, did so without specifying which defendant.

"3. That the justice, in entering the appearance of defendant on the trial day, did so without specifying which defendant appeared."

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The justice made a return to the circuit court, setting out a copy of his docket as above. Defendants then moved the circuit court for further return, asking the justice to state:

"1. Who became security for costs in said cause.
"2. If said plaintiff's name is not Charles G. Hinkle; if not, to state what it is.
"3. Also return a copy of summons in said cause.
"4. Also state which defendant Mr. Riley appeared for on February 9, 1894, and state which defendant then appeared.
"5. Also state which defendant judgment was rendered against."

The justice made further return that plaintiff's name is Charles G. Hinkle; that both defendants appeared on the adjourned day, by John Riley, attorney; and that he entered judgment against H. M. Collins & Co. On the hearing of the special appeal in the circuit court, the court found that the judgment of the justice "is uncertain, void, and of no effect," and thereupon quashed the proceedings, with costs against the plaintiff and his security for costs. Plaintiff brings error.

The defendants having asked a further return, and it having been made, they are now bound by it. The amended return shows that both defendants appeared, and the judgment was rendered against both. By the appearance of the plaintiff and both the defendants the justice had jurisdiction to hear and determine the cause.

The only question, then, remaining, is whether the plaintiff could sue by the initials to his name, without stating his full Christian name. In *Fewlass* v. *Abbott*, 28 Mich. 270, it was held that the objection to the name in which the suit was brought by the plaintiff was not well taken; that it will not be presumed, for the purpose of invalidating the judgment in his favor, and in the absence of any showing upon the subject, that the plaintiff has any other name than the one used. In that case the plaintiff sued in the name of O. B. Abbott. The

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same rule was laid down in *State* v. *Webster*, 30 Ark. 166; *Burford* v. *McCue*, 53 Pa. St. 427; *Dana* v. *Fiedler*, 12 N. Y. 40 (62 Am. Dec. 130); *Perkins* v. *McDowell*, 3 Wyo. 328. In the latter case the court said:

"While it does not occur frequently, there are many instances when single letters constitute the only Christian name. We cannot, then, judicially know that the letters 'J. M.' are not a name, and, as the petition does not disclose that the letters 'J. M.' are not the Christian name of the plaintiff, it follows that there is no defect apparent on the face of the petition."

But counsel for defendant contend that the amended return of the justice shows that Mr. Hinkle's Christian name is Charles. The justice's summons, his docket entries, and the whole proceedings had before him were returned by the first return. Mr. Hinkle, as appears by the docket, was sworn as a witness, and every entry in the summons and on the docket shows that his Christian name is C. G. It is not made apparent from any of the papers how the justice could judicially know that the name was any other than C. G.

We think the court was in error in reversing the judgment of the justice. That judgment will be reversed, with costs of this court to plaintiff. Inasmuch as the circuit court had jurisdiction of the case upon the appeal of defendants, the cause must stand for hearing in that court on the merits.

The other Justices concurred.

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## HOFFMAN v. BAY CIRCUIT JUDGE.

1. ATTORNEYS AT LAW—PRIVILEGE—SERVICE OF PROCESS.
The privilege of exemption of attorneys from arrest in certain cases, given by 2 How. Stat. § 7253, is not exclusive of the common-law privilege from service of process while attending court, or while going thereto or returning therefrom.

2. SAME.
An attorney at law is privileged from the service of process while attending upon the Supreme Court, and while going to the court, and returning therefrom to the county of his residence.

*Mandamus* by Henry Hoffman to compel Andrew C. Maxwell, circuit judge of Bay county, to dismiss a suit against relator for want of proper service. Submitted May 18, 1897. Writ granted May 25, 1897.

*C. R. Brown*, for relator.

*C. L. Collins*, for respondent.

MONTGOMERY, J. Relator is an attorney at law, and at the October term of this court appeared and argued a cause in this court, and, while on his return to his home at St. Ignace, was served with a summons at the suit of John Godkin, a party to the case pending in this court. He moved to dismiss the proceeding on the ground that he was privileged from the service of process while attending upon the court, and while going to and returning from the court to the county of his residence. The circuit judge denied the motion, and the question is before us for review on *mandamus*.

The only statute of this State bearing upon the subject is section 7253, 2 How. Stat., which reads:

"All officers of the several courts of record shall be liable to arrest, and may be held to bail, in the same manner as other persons, except during the actual sitting of

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any court of which they are officers, and, when sued with any other person, such officers shall be liable to arrest, and may be held to bail, as any other persons, during the sitting of the court of which they are officers; but no attorney, solicitor, or counselor shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court."

It is said by respondent's counsel that this statute should be held to exclude all other privilege, and that this only relates to *arrest* on civil process, and does not apply to the service of summons. We think the statute should not be so construed, but that if, at the common law, the attorney was privileged from the service of process while attending upon court, that privilege has not been removed by the statute in question.

In 2 Tayl. Ev. § 1330, the common-law rule is stated:

"In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of the judicial proceeding, but, in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance, they are protected from arrest upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home."

In the case of *Mitchell* v. *Huron Circuit Judge*, 53 Mich. 541, it was held by this court that, as to parties, the privilege extends to the service of summons as well as to suit commenced by arrest. It was said that "public policy, the due administration of justice, and protection to parties and witnesses alike demand it." In *Cofrode* v. *Wayne Circuit Judge*, 79 Mich. 332, 349, Mr. Justice CAMPBELL, referring to *Jacobson* v. *Wayne Circuit Judge*, 76 Mich. 234, said: "It has been settled that service cannot be made within the original county on any one who is there as a witness, or on any other legal errand which exempts him from process while away from his resi-

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dence." In *Matthews* v. *Tufts*, 87 N. Y. 568, the defendant attended a meeting of creditors of a bankrupt, for the purpose of proving claims in his own behalf and in behalf of others whom he represented. The court, after reviewing the authorities, say: "The plaintiff claims that the defendant was not attending as a witness, but only as a creditor. * * * Conceding that the defendant was in attendance only as a party, and as attorney of other parties, we think he was privileged from service of process or summons while so attending." It was further said: "This immunity does not depend upon statutory provisions, but is deemed necessary to the due administration of justice." In *Central Trust Co. of New York* v. *Milwaukee St. R. Co.*, 74 Fed. 442, a subpœna was served upon a nonresident attorney while attending upon the court in another county. Upon a review of the authorities, the court held that this was a violation of privilege. In *Sherman* v. *Gundlach*, 37 Minn. 118, it was said: "The same reasons for exempting a nonresident witness from arrest exist in favor of exempting him from the service of a summons in a civil action." In *Massey* v. *Colville*, 45 N. J. Law, 119 (46 Am. Rep. 754), it was said: "The foundation of the rule is the impolicy of permitting an act which will deter suitors or witnesses from attending courts." This consideration applies with equal force to an attorney. See, also, *Gilbert* v. *Vanderpool*, 15 Johns. 242; *Van Alstyne* v. *Dearborn*, 2 Wend. 586; *Hurst's Case*, 4 Dall. 387; *Lyell* v. *Goodwin*, 4 McLean, 39.

The writ will be granted.

The other Justices concurred.

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## SHERIDAN *v.* COLTON.

LOG-LIEN PROCEEDINGS—SERVICE AND RETURN—INVENTORY.

It is essential to the validity of attachment proceedings under the log-lien law (Act No. 229, Pub. Acts 1887), where the property attached was not in transit, that it appear from the officer's return that a copy of the inventory was served upon the principal defendant.

Error to Montmorency; Kelley, J. Submitted April 27, 1897. Decided May 25, 1897.

Attachment proceedings in justice's court under the log-lien law, by Thomas Sheridan against Benjamin Colton. There was a judgment for plaintiff, which was reversed in the circuit court on *certiorari*. Plaintiff brings error. Affirmed.

*James Francis*, for appellant.

*Henry K. Gustin*, for appellee.

LONG, C. J. This action was brought in justice's court under Act No. 229, Pub. Acts 1887. The attachment was issued April 6, 1895, by the justice, whose office was in Montmorency county, and directed the officer to seize about 14,000 pieces of cedar ties, paving, and posts banked on Gilchrist creek. The writ further directed the officer to summon Benjamin Colton to be and appear before the justice on April 17th at 4 p. m., to answer the plaintiff, etc.; and, further, that in case the defendant in the writ was not the owner of the cedar posts, etc., he was to serve the writ upon the owner, his agent or attorney, if found within the State. It appears that the plaintiff, on April 6, 1895, filed in the office of the county clerk of Montmorency county a statement of his claim of lien upon the property described in the writ for labor per-

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formed by him in cutting, skidding, hauling, and banking the cedar posts, etc., in question, and showing that the last day's labor was performed on April 5, 1895. The affidavit for the writ of attachment and the writ itself are in due form. The officer made return to the writ on the return day. The return states that, on the 8th day of April, he seized and took into his possession 2,000 cedar ties and 400 pieces of paving, and he then certifies that—

"I served a certified copy of said writ on William Bates, the foreman of the drive on Gilchrist creek, in Montmorency county, who was then and there engaged in driving said ties and posts; that on the 11th day of April, 1895, I served the said writ by delivering to him a copy thereof, duly certified to by me, on Benjamin Colton, the within-named defendant, by delivering to him, at the city of Alpena, Alpena county, a copy of said writ, duly certified by me, and showing him the original; and that on the said 11th day of April, 1895, I served a copy of said writ on Granville S. Fowler, to me known to be the agent of the owner of said ties and posts, and said service was made in Alpena township, of Alpena county, Michigan."

On the return day the defendant, Benjamin Colton, and the owner of the ties, posts, etc., Mr. Edward E. Ayer, appeared specially by their attorney, who filed a plea in abatement, asking the suit to be quashed, because Benjamin Colton was a resident of Alpena county, and Mr. Ayer a resident of the city of Chicago, and the justice acquired no jurisdiction over the ties and posts, and that the officer had no authority to serve the papers, that no papers were served upon Mr. Ayer, and that no service was made in accordance with law. This motion was overruled, and the cause proceeded to trial before the justice, who entered judgment in favor of plaintiff and against the defendant of $73 damages and $11.15 costs of suit. The defendant removed the case to the circuit court by *certiorari*, where the judgment was reversed. Plaintiff brings error.



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It is contended that the justice did not acquire jurisdiction because no copy of the inventory was served upon the defendant with a copy of the writ of attachment. The officer's return does not show that such inventory was served, though one was made. The question was raised in *Federspiel* v. *Johnstone*, 87 Mich. 303, and it was there said:

"We are of the opinion that the service mentioned in section 11 is not required in the case of a log owner who is not the defendant in attachment, and who is notified of the proceedings so that he may protect his interests in the product attached, and that the notice to be given is the one provided for in section 6."

This question was raised again in *McGuire* v. *McKnight*, 101 Mich. 275; but in that case, as in *Federspiel* v. *Johnstone*, *supra*, the logs were in transit, and hence no inventory could be made. The question was also before us in *White* v. *Prior*, 88 Mich. 647, and there it was held that the proceedings were void, as the return to the writ did not show that the officer served a certified copy of the inventory of the property seized upon either the principal defendant or the owner of the property. In the present case the property was not in transit. An inventory had been made, but no copy was served upon either the principal defendant or the owner of the property. As this must dispose of the case, we need not discuss the other questions raised.

The judgment of the court below must be affirmed.

The other Justices concurred.

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RANDALL v. CHICAGO & GRAND TRUNK RAILWAY CO.

1. MASTER AND SERVANT—LIABILITY OF MASTER TO THIRD PERSONS —BURDEN OF PROOF.

In an action to recover for injuries inflicted by defendant's servant, the plaintiff has the burden of proving that the act complained of was within the scope of the servant's employment.

2. RAILROAD COMPANIES—EJECTION OF TRESPASSER FROM TRAIN—AUTHORITY OF BRAKEMAN.

A brakeman on a freight train has no implied authority to eject trespassers. MONTGOMERY, J., dissenting.

3. SAME—RULES OF COMPANY.

The fact that the rules of a railroad company prohibit the carrying of passengers upon freight trains, and that brakemen are required to familiarize themselves with the rules of the company, does not establish the authority of a brakeman upon such a train to eject one who boards the same for the purpose of taking passage thereon, where the rules further provide that brakemen shall be under the orders of the conductor. MONTGOMERY, J., dissenting.

Error to Eaton; Smith, J. Submitted January 7, 1897. Decided May 28, 1897.

Case by William A. Randall against the Chicago & Grand Trunk Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

*Geer & Williams* (*E. W. Meddaugh*, of counsel), for appellant.

*Powers & Stine*, for appellee.

LONG, C. J. This action was brought to recover damages for injuries claimed to have been sustained by plaintiff by being compelled by a brakeman to jump from a

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freight train, while in motion, belonging to defendant. The injury occurred March 19, 1894. The plaintiff, without permission of the defendant, got upon one of defendant's freight trains at Charlotte, this State. When the train arrived near Olivet Hill, plaintiff was discovered by one of defendant's brakemen between two cars, holding onto the projecting iron at the end of the car. Plaintiff claims that, while the train was running at a high rate of speed, he saw the brakeman, and climbed around upon the side of the car, taking hold of the ladder which is used to climb onto the car. The brakeman then commenced pouring black oil upon him, and said, "Are you going to get off from here?" That his hands got so slippery from the oil that he could not hold on longer, when he jumped off, and was severely injured.

On the trial the court instructed the jury:

"If you believe from the evidence that the brakeman of defendant's train commenced pouring oil upon the plaintiff while he was riding upon the car, and continued to pour oil upon him until his hands became so slippery from the oil that he could hold on no longer with safety, and that it was safer for him to jump than it would be to attempt to remain hanging to the train, and he did so jump, and was injured thereby, your verdict must be for the plaintiff."

There was verdict and judgment for plaintiff.

It appeared upon the trial that this was a through freight train, not authorized to carry passengers without special permit from the officers of the company. The company had printed rules. Certain of those rules were printed upon cards and hung in the way stations. Upon one in the station at Charlotte the following rule was printed:

"Passengers will not be carried under any circumstances upon any freight train, except such as are designated and between points named upon the time-table; nor will they be carried upon such freight trains unless provided with freight-train permits."

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This was not one of the trains named upon the time-table, and the plaintiff had no permit to ride thereon. He was a trespasser in getting upon the train. He had no right there. By rule 172 of the company it is provided, "Brakemen are under the orders of the conductor;" and by rule 170 it is also provided, "Brakemen must make themselves thoroughly acquainted with the whole code of signals and the instructions referred to in these rules and regulations, as well as those embodied in the said time-table." At the close of the testimony, counsel for defendant requested the court to charge the jury that their verdict must be for the defendant. This was refused, and the question was submitted to the jury for their determination as one of fact.

Counsel for plaintiff contend that the record shows that the brakeman had the authority to remove the plaintiff from the train, and having exercised that authority in a cruel and unjustifiable manner, by means of which the plaintiff was injured, a right of action exists against the defendant company. This contention is based upon the rules of the company, which were put in evidence. The claim is made that inasmuch as the rules provided that this class of trains should not carry passengers, and the brakemen of the defendant company were required to familiarize themselves with those rules, the brakeman must have known that it was his duty, and that he was authorized by the company, to eject the plaintiff from this train, and that in ejecting him he was in the discharge of a duty which the company had imposed upon him. On the other hand, it is contended by counsel for defendant that, under rule 172, brakemen of freight trains are subject at all times to the orders of the conductors of the trains; that the rules nowhere imply that a brakeman has authority to eject, or that the company has placed upon the brakemen the duty of ejecting, even trespassers from freight trains, but that they are subject to the orders of the conductors of such trains; and that in the present case the brakeman is not shown to have received any

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such orders, and that, therefore, his act in ejecting the plaintiff was not the act of the defendant company; that it became necessary, in order to entitle plaintiff to recover, that he should prove, not only that he was injured because of the wrongful act of the brakeman, but also that the brakeman was acting within the scope of his employment, and in the line of his duty, in causing plaintiff to jump off. In other words, that he must show that the brakeman inflicting the injury possessed the authority to do the act which resulted in the injury. It is conceded that there is no proof in that regard, unless the rules of the company are to be construed as contended by counsel for plaintiff.

We think the rules cannot be so construed. It is true that passengers are not permitted to ride upon this class of freight trains, and that brakemen are required to familiarize themselves with these rules; but under rule 172 the brakemen must take their orders from the conductor. There is consequently no proof in the case that the brakeman here had authority from the company to do the act complained of. The burden was upon the plaintiff to show such authority. In *Corcoran* v. *Railroad Co.*, 6 C. C. A. 231, 56 Fed. 1015, it appeared that plaintiff was riding on top of a freight car without having paid any fare; that he was ordered off by a person whom he assumed to be a brakeman; that the brakeman seized him and threw him off while the train was in rapid motion, whereby he was injured. The court directed a verdict in favor of defendant, and the court of appeals affirmed the ruling, saying:

"The court is of the opinion that plaintiff should have offered some evidence showing the scope of the alleged brakeman's authority. He failed to do so, and for that reason the judgment must be affirmed."

In *Pennsylvania Co.* v. *Dean*, 92 Ind. 459, 462, it was said:

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"But if the appellee was on the train without right, being a mere trespasser, the fact that the injury was occasioned by the negligent or unlawful acts of the appellant's employés would not make the appellant liable, unless it further appeared that the acts complained of occurred within the scope of the servants' employment."

In *Towanda Coal Co.* v. *Heeman*, 86 Pa. St. 418, the plaintiff, a small boy, climbed upon the cars of defendant. After the train had started, he was seen by one of the brakemen, who threw some pieces of coal, which struck the boy in the face, in consequence of which he slipped and fell in trying to get off the car. There was no evidence given of the authority of the brakeman to eject trespassers from the train, and the defendant asked an instruction that a verdict be rendered in its favor on this ground. This the court refused, but submitted the question to the jury to determine whether the brakeman was acting within the scope of his employment. The case was appealed, and it was said by the appellate court:

"A careful examination of all the testimony has shown that not a word contained in it tended to prove that the brakeman whose conduct is complained of, in the cruel and wanton assault he made on the plaintiff, was acting in pursuance of any authority conferred on him. The only affirmative proof was precisely in the opposite direction. * * * Upon the facts developed on the trial, although the plaintiff had no right to be on the cars, the jury would have been justified in finding, as they did, such reckless, gross, and culpable negligence as to render the defendant liable for damages, if the brakeman had been shown to have been acting in the line of his duty and within the scope of his employment. With no evidence that he was so acting, and with the testimony of the assistant superintendent to the contrary, it was a mistake to submit the question whether the wrongful act was or was not done in the exercise of a duly-delegated authority."

The following cases sustain this rule: *International, etc., R. Co.* v. *Anderson*, 82 Tex. 516; *Texas, etc., R. Co.* v. *Moody*, (Tex. Civ. App.) 23 S. W. 41; *Bess* v. *Railroad Co.*, 35 W. Va. 492 (29 Am. St. Rep. 820);

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*Lake Shore, etc., R. Co.* v. *Peterson*, 144 Ind. 214; *Farber* v. *Railway Co.*, 116 Mo. 81. Under the rule laid down in these cases, the defendant was entitled to have its request given that a verdict be rendered in its favor.

The judgment must be reversed. No new trial will be ordered.

GRANT and MOORE, JJ., concurred with LONG, C. J. HOOKER, J., did not sit.

MONTGOMERY, J. (*dissenting*). There is a conflict in the authorities upon the question presented in this case, namely, whether a brakeman on a freight train has implied authority to eject a trespasser. On principle, I am of opinion that such authority is to be implied from the nature of his employment. In the present case it was shown that the rules of the company prohibited the carrying of passengers upon the train in question, and it was shown that it was by another rule provided that it was the duty of the brakemen of the company to familiarize themselves with all its rules. In Patt. Ry. Acc. Law, § 111, it is said to be the doctrine of most of the cases that when a railway servant is put in charge of any of the property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is therefore, for that purpose, vested with an implied authority to remove trespassers therefrom. This doctrine is approved in *Brevig* v. *Railway Co.*, 64 Minn. 168, 172, where it is said that: "The duties of a freight-train brakeman do not consist merely of turning the brakes. By universal custom, he has police duties as to the cars immediately under his charge."

It was said in *Hoffman* v. *Railroad Co.*, 87 N. Y. 25, 30 (41 Am. Rep. 337), speaking of the brakeman:

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"His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train, concerned in its management, and fully cognizant of the obvious fact that intruders, who jump upon the train for a ride, without intention of becoming passengers, are wrongfully there."

See, also, *St. Louis, etc., R. Co.* v. *Reagan*, 52 Ill. App. 488; *Vertrees' Adm'r* v. *Railway Co.*, 95 Ky. 314; *Houston, etc., R. Co.* v. *Bolling*, 59 Ark. 395; *Kansas City, etc., R. Co.* v. *Kelly*, 36 Kan. 655 (59 Am. Rep. 596); *Smith* v. *Railroad Co.*, 95 Ky. 11.

A distinction was attempted to be drawn on the argument between a freight train and a passenger train, favorable to the defendant's contention. In my opinion, the authority of the freight brakeman is quite as clear as would be that of a passenger brakeman. It may be said with some force that, before the brakeman would have implied authority to eject an apparent trespasser from a passenger train, the conductor should be consulted, for the reason that it is the conductor who is to determine who are authorized to ride upon the train, while in the case of a freight train not carrying passengers it is at once apparent to the brakeman that a stranger boarding the train is a trespasser.

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## HARTIGAN *v.* MICHIGAN CENTRAL RAILROAD CO.[1]

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RAILROAD COMPANIES—EJECTION OF TRESPASSERS ON TRAINS—LIABILITY FOR INJURIES.

A railroad company is not liable for injuries to a trespasser ejected from a train by a brakeman who had no authority to eject him.

Error to Calhoun; Smith, J. Submitted January 15, 1897. Decided May 28, 1897.

Case by George Hartigan against the Michigan Central Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

*Hulbert & Mechem*, for appellant.

*L. B. Tompkins* (*Herbert E. Winsor*, of counsel), for appellee.

MOORE, J. November 17, 1895, the plaintiff boarded an extra freight train belonging to the defendant, which was not allowed to, and did not, carry passengers, with the intention of stealing a ride. His version of what occurred, briefly stated, is that he was discovered by a brakeman while he was standing on a bumper, holding fast to the ladder which was on the side of a freight car, and was ordered to get off the train while it was going too fast for him to do so with safety. He claims the brakeman threatened to kick him off if he did not go, and started down the ladder as though to put his threat into execution. The plaintiff says that, believing the brakeman meant to do what he had threatened to do, and that it would be safer for him to jump than to remain on the car, he did jump, and received very serious injuries. The plaintiff does not claim the brakeman either struck or

[1] Rehearing denied June 18, 1897.

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kicked him. The brakeman's version of what occurred was a denial of the account given of the transaction by the plaintiff. He says he told the plaintiff that he was going back to set the brakes, to slow up the train for signals, and, if the train went slow enough, for him to get off, and, if not, that he would have to get off at Concord, where the train stopped. The plaintiff sued the defendant to recover for the injuries received by him. When the testimony was all in, the attorneys for the defendant asked the court to direct a verdict for the defendant upon the ground that plaintiff had not shown that the brakeman had authority to remove trespassers like Hartigan, and because it appeared affirmatively that he did not have such authority, and that, if he did what plaintiff claimed he did, he was acting outside of the scope of his authority, and the defendant would not be liable for his acts. The trial judge declined to accept this view, and submitted the case to the jury, who rendered a verdict for the plaintiff. Defendant appeals.

The only way this case differs from the case of *Randall* v. *Railway Co.*, *ante*, 115, is that in this case it appears affirmatively that the brakeman did not have the authority to eject trespassers from extra freight trains unless so directed to do by his superiors, while in the *Randall Case* that fact did not appear affirmatively. The opinion in *Randall* v. *Railway Co.* discusses so fully the principles of law involved in this case that it is not necessary to repeat them here.

The judgment is reversed, and no new trial ordered.

LONG, C. J., and GRANT, J., concurred with MOORE, J. HOOKER, J., did not sit.

MONTGOMERY, J. (*dissenting*). My views upon the main question involved in this case are sufficiently expressed in *Randall* v. *Railway Co.*, *ante*, 120.

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## O'CONNELL *v.* MENOMINEE BAY SHORE LUMBER CO.

1. CONSTITUTIONAL LAW—JUSTICES OF THE PEACE—JURISDICTION—SERVICE OF PROCESS.

   2 How. Stat. § 7317, which authorizes the service of process, in certain classes of cases, in counties adjoining that in which the court issuing the process is held, does not, as applied to justices of the peace, operate as an unconstitutional enlargement of the jurisdiction of constitutional officers, in view of the express provision of the Constitution that the powers and duties of justices shall be defined and regulated by law.

2. SAME—CLASS LEGISLATION.

   Such statute, however, is invalid as class legislation, in that it gives special privileges to suitors upon specified classes of claims, and also excludes corporations, and, so far as the jurisdiction of justices of the peace is concerned, associations of individuals, from the benefit of its provisions.

Error to Dickinson; Stone, J. Submitted February 3, 1897. Decided May 28, 1897.

*Assumpsit* by Patrick O'Connell against the Menominee Bay Shore Lumber Company for work and labor performed. From a judgment for plaintiff, defendant brings error. Reversed.

*B. J. Brown*, for appellant.

*Cook & Pelham*, for appellee.

HOOKER, J. 2 How. Stat. § 7317, permits the service of process, in certain classes of cases, in counties adjoining that within which the court issuing the process is held. These classes of cases are trespass and injuries to lands, cases for the unlawful conversion of crops, and actions wherein the demand is principally for labor or services performed by any individual or company. The defendant is a corporation, and was sued before a justice

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of the peace in a county adjoining that in which it was domiciled, the process being a short summons. Its counsel contends that this statute enlarges the jurisdiction of justices, which cannot be done under the Constitution. It is said that they are constitutional officers, with well-known powers, which may not be changed. We consider the Constitution itself a sufficient answer to this, in that it expressly provides that the "powers and duties [of justices] shall be defined and regulated by law."

Next it is said that this is class legislation. The obvious purpose of this statute is to afford special privileges to suitors upon specified classes of claims, by permitting a different and more effective use of the courts and their process than is permitted in other cases. It is true that it permits everyone (except as hereinafter shown) who may possess a claim that falls within the classes mentioned to avail himself of the privilege, but the design and practical effect is plainly to give to one class in the community special facilities for the collection of money which others do not enjoy. Under this act, one who has a claim for services rendered by an individual or company (but not a corporation) may have the jurisdiction of a justice extended to half a dozen or more counties, while merchants, manufacturers, and others cannot. A farmer or other person who sells a load of wood in an adjoining county cannot have the benefit of this act, though the man to whom he sells it may compel him to answer a claim for services away from home. It has always been the rule that an alleged debtor could not be compelled to go away from his own county to defend a personal action under ordinary circumstances, and it is one of the unfortunate signs of the times that special advantages, especially to the extent of discrimination between the suitors of one and the same court, should be deemed necessary. It is true that any one can have the benefit of this act (except as indicated) who chooses to perform service, or, perhaps, to purchase such a claim; and so, in a technical sense, it may be said to apply to every one, and therefore not to be

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class legislation. But, whatever may be thought of this, the act itself excepts from its benefits to a certain extent all companies, thus denying to firms or other associations, as well as to corporations, the privilege which is given to single suitors. It discriminates against the persons who unite in their labor or in purchasing such claims. It first gives the privileges to companies as well as individuals, and afterwards, by a proviso, limits its application to companies, by excluding the right in actions before justices,—another indication that the design was to give to certain classes special privileges.

In *Wilder* v. *Railway Co.*, 70 Mich. 382, the statute providing for the recovery of an attorney fee against railroads in actions for damages for killing cattle was held unconstitutional, upon the ground "that the legislature had attempted to grant special advantages to one class, at the expense of and to the detriment of another, and had undertaken to make the courts themselves the active agents in this injustice." In that case any one who might own and have cattle killed by a railroad was entitled to the benefit of the act, yet the court had no difficulty in saying that the law was intended "to grant a special benefit to a class." A similar law giving an attorney fee in actions for wages was declared unconstitutional by the supreme court of Ohio in the case of *Coal Co.* v. *Rosser*, 53 Ohio St. 12 (29 L. R. A. 386). The same doctrine is held in *Grand Rapids Chair Co.* v. *Runnels*, 77 Mich. 104; *Schut* v. *Railway Co.*, 70 Mich. 433; *Rinear* v. *Railroad Co.*, Id. 620; *Lafferty* v. *Railway Co.*, 71 Mich. 35. In these cases the discrimination between classes of suitors related to the amount of costs taxable. In the present case it relates to the territorial jurisdiction of the court, and does not appear to be based on any necessity. Mr. Justice MORSE indicated a doubt of the constitutionality of this act in the case of *Antcliff* v. *June*, 81 Mich. 492 (21 Am. St. Rep. 533). We think it unconstitutional.

The judgment is reversed, and no new trial ordered.

The other Justices concurred.

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## GATES v. COMSTOCK.

1. TRESPASS—CUTTING TIMBER—MEASURE OF DAMAGES.
   In an action for trespass to land by cutting the timber thereon, an instruction that the measure of damages is the depreciation in the value of the land by reason of the trespass, and that the value of the stumpage, while proper to be considered by the jury, is not conclusive upon the amount of the recovery, is not improper, although the value of the land consisted exclusively in the timber, where there is testimony showing the value of the real estate both before and after the trespass.
2. SAME—INTEREST—TREBLE DAMAGES.
   In such case, interest on the amount of damages from the date of the injury is allowable, and, where included in the verdict, is to be treated as a part of the damages for the purposes of 2 How. Stat. § 7957, providing for treble damages in actions of trespass.
3. SAME—INTENT.
   A trespass is willful and intentional, authorizing the trebling of damages under said statute, where it appears that the defendant and his employés knew the location of the boundary line between defendant's land and that of the plaintiff before the trespass was committed.
4. SAME—PARTNERSHIP.
   A member of a firm is equally liable with his copartners under such circumstances, although having no personal knowledge of the situation.
5. SAME—EVIDENCE—COST PRICE.
   In trespass for cutting timber, evidence of the cost to plaintiff of that portion of the tract of land upon which the trespass was committed, based upon the purchase price for the entire tract, and the comparative value of the timber upon the two portions, is competent upon the question of damages, where such purchase price was based on the stumpage.

Error to Alpena; Kelley, J. Submitted February 5, 1897. Decided May 28, 1897.

Trespass under 2 How. Stat. chap. 272, by Samuel G. M. Gates against Andrew W. Comstock and William B.

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Comstock, survivors, etc. There was a judgment for plaintiff, and both parties bring error. Affirmed.

*J. D. Turnbull* (*Humphrey & Grant* and *C. L. Collins*, of counsel), for plaintiff.

*Frank Emerick* and *J. H. Cobb*, for defendants.

MONTGOMERY, J. This is an action of trespass on lands, brought under the statute authorizing recovery of treble damages in case of willful trespass. The case was before the court, and is reported in 107 Mich. 546, and was sent back for a new trial. The declaration has since been amended to conform to the requirements of the former opinion, the case again tried, and the plaintiff has recovered a verdict of $2,295, upon which judgment was entered for three times the amount by the circuit judge. The defendants again bring error.

On the last trial the plaintiff's right to recover for any trespass actually committed upon the lands in question appears not to have been controverted. The questions for determination were whether the defendants cut and removed the timber in question; if they did, whether they were liable in treble damages; and as to what rule should have been given to the jury on which to measure the damages in the verdict. The circuit judge charged the jury that the action was brought for an injury to the freehold; that the question for the determination of the jury was how much plaintiff's property had been injured,—his property in the land and timber; what was the loss or injury to the real estate, to the land, to the freehold, sustained, —and further said:

"It is not, arbitrarily, so much a thousand stumpage, or so much a thousand for the boards, or anything else. * * * You may consider what the value of the timber was, as some aid to your judgments in determining what should be the compensation in this case. I have permitted to go to you the value of the logs,—the value of the stumpage, I would say,—not as conclusive, not for the purpose of governing you as to how much this plain-

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tiff ought to recover, if he is entitled to recover at all, but for the purpose of throwing some light upon the extent of the injury to the freehold in this case."

This instruction is complained of on the ground that, as the value of the land was shown to have been exclusively in the pine timber, the value of the stumpage should properly measure the recovery. We do not understand counsel for the defendants to contend that the instructions do not, in the abstract, state the correct rule, but the contention is that, as applied to this particular case, such instruction is misleading. But we think the charge not open to this objection, under the proofs in the case. There was testimony showing the value of the real estate both before and after the trespass, which it was proper for the jury to consider.

It is further claimed that the court erred in instructing the jury to add interest to the amount of damages, from the time of the injury. We think there was no error in this. See *Snow* v. *Nowlin*, 43 Mich. 383; *Cook* v. *Perry*, Id. 623; *Winchester* v. *Craig*, 33 Mich. 205; *Woods* v. *Gaar, Scott & Co.*, 93 Mich. 143.

But it is contended that if it is proper to include interest in the verdict, as a part of the damages recoverable, yet such damages should not be trebled. This question has never been expressly decided by this court. The case of *Howser* v. *Melcher*, 40 Mich. 185, is cited in support of defendants' contention. That case arose under a statute differing materially from the one here involved, and the verdict included an item for rent, an item of interest on the amount, and an item called "damages." The court said:

"There is no provision to recover or treble anything else than 'damages,' whatever may enter into them. Nothing except what the jury find and report as 'damages' is authorized to be trebled, and, in trebling the damages found, the language of the verdict must control."

But whether the verdict would be capable of being trebled in making up the judgment, if properly found and



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reported as damages, the court did not decide, as it was deemed unnecessary for the determination of the case.

The statute under consideration provides that the person guilty "shall be liable to the owner of such land * * * in three times the amount of damages which shall be assessed therefor, in an action of trespass, by a jury." 2 How. Stat. § 7957. We think this statute contemplates the trial of the cause, the assessment of damages according to the usual forms of law by the jury (which would, in a proper case, include interest), and that such damages, when so found, shall be trebled by the court. See *Lane* v. *Ruhl*, 103 Mich. 38.

Complaint is also made of the instruction of the court to the jury upon the subject of whether the trespass was casual and involuntary. The instruction complained of is as follows:

"If you believe the testimony of Mr. Comstock, that he knew where that line was before he commenced to cut upon his own timber, and if you further find from all the evidence in this case that a trespass was committed upon the Gates lands, and committed by these defendants, then I instruct you that it would be willful and intentional trespass."

We think this instruction justified by the testimony in the case. Mr. W. B. Comstock testified that he knew where the south boundary line of defendants' land was in 1891 and 1892, that the line was plainly marked when they began cutting, that he showed this line to both of defendants' foremen, and that they both knew where it was. The real question of fact in controversy would appear by the evidence to have been whether the lands of plaintiff had been previously cut over, or whether, on the other hand, they were cut during the winter of 1891 and 1892, by defendants. This cutting was strenuously denied by defendants, and as earnestly insisted upon by the plaintiff, and the evidence was conflicting; but, in view of the testimony of Mr. Comstock, it can hardly be said that, if there was a cutting at all, it was casual and involuntary.

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It is also contended in this court that it was error to treble the damages as to defendant Andrew W. Comstock, without showing that the trespass was intentional on his part. We think this position cannot be maintained. The cutting was by the agents of the firm of which Andrew W. Comstock was a member, and we think he is liable for the full consequences of the trespass.

Complaint is made of the ruling of the circuit judge permitting testimony as to the cost of these lands to the plaintiff, and admitting the plaintiff's own estimate of the value of the lands, it appearing that he never had seen them. The cost was shown by evidence of the purchase price paid for these lands, together with others, in one body, upon the basis of the pine estimated; the purchase price of the whole being $22,500, and the estimated purchase price of these lands, upon this basis, being $5,500. We think this testimony was not wholly incompetent, as it tended to show what these specific lands in fact brought, if the purchase price was based upon the stumpage, as would appear to be the case by the testimony.

The testimony of the witness Gates as to the market value, we think, should have been excluded. But it is quite evident from the testimony that the market value, which he fixed at $6,000, was really based upon the stumpage, assuming that the timber was there, and it is evident that the testimony of this witness could not have misled the jury. Indeed, the verdict of the jury shows conclusively that this testimony must have been rejected, as the verdict was for $2,295, which included interest from the date of the trespass up to the time of the trial. We are therefore of the opinion that the error worked no prejudice to defendants.

The plaintiff has also brought error, and asks that we enter judgment in this court for the amount of the purchase price of this timber, agreed to, as paid by the plaintiff. As will appear from the opinion of the court when the case was here before, the plaintiff derived his right of action by assignment from one Hurst. Hurst had agreed

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to sell these lands, with other lands, to the plaintiff, at the price of $22,500. The plaintiff's claim is that upon this basis the lands in question would have brought Hurst $5,500, and that, therefore, the damages to Hurst must have been that amount, and that, as plaintiff sues in his right, he is entitled to recover that sum. There are two obstacles in the way of granting the request of plaintiff: *First*, it is to some extent a matter of speculation as to whether the purchase price of these lands would be $5,500; and, *second*, the plaintiff submitted a special question to the jury, as follows: "Did these three forties, known as the Gates lands, or the pine timber thereon, cost plaintiff at least $5,500?" which question was answered in the negative. We certainly could not enter judgment in the face of this finding. The most we could do would be to reverse the judgment and remand the case for a new trial. As we do not understand the plaintiff to ask this, the judgment of the court below will be affirmed.

GRANT, HOOKER, and MOORE, JJ., concurred. LONG, C. J., did not sit.

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## SUPREME LODGE KNIGHTS OF PYTHIAS *v.* IMPROVED ORDER KNIGHTS OF PYTHIAS.

1. FRATERNAL AND BENEVOLENT ASSOCIATIONS—CORPORATE NAME. The act of Congress incorporating the Supreme Lodge Knights of Pythias did not confer upon such corporation an exclusive right to the use of the name "Knights of Pythias," since that name was already in use by an existing voluntary association.

2. SAME—SCHISM—REASSOCIATION UNDER SIMILAR NAME. While members withdrawing from a fraternal society are not at liberty to associate themselves under a name so like the name of the parent order as to be calculated to deceive ordinary persons proceeding with ordinary care, they may, subject to this limitation, use any derivative of such name that they may see fit to employ.

3. SAME—INJUNCTION. The name "Improved Order Knights of Pythias," adopted by withdrawing members of the Knights of Pythias, is not calculated to mislead, and therefore its use will not be enjoined.

Appeal from Wayne; Carpenter, J. Submitted April 8, 1897. Decided May 28, 1897.

Bill by the Supreme Lodge Knights of Pythias against the Improved Order Knights of Pythias and others to enjoin the use of the name adopted by the defendant order. From a decree dismissing the bill, complainant appeals. Affirmed.

*Philip T. Colgrove* and *John C. Burns* (*Philip T. Van Zile*, of counsel), for complainant.

*Conely & Taylor* (*Florea & Seidensticker*, of counsel), for defendants.

MONTGOMERY, J. Complainant filed a bill for an injunction, praying that defendants be restrained from using the ritual and jewels of the order of the Knights of

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Pythias, and from using the name "Improved Order Knights of Pythias." A careful examination of the authorities cited by counsel, and of the reasons urged by them, has failed to convince us that the learned trial judge erred in dismissing the bill. The opinion of Judge Carpenter contains so full a review of the case, and its reasoning is so satisfactory, that we adopt it as our own. That opinion is as follows:

"The Knights of Pythias is a secret, unincorporated society, organized in 1864, and has about 500,000 members. Complainant is the Supreme Lodge of the Knights of Pythias, and was incorporated by special act of Congress in 1894. The Improved Order Knights of Pythias is also a secret, unincorporated society, and had, June 30, 1895, when the last report was made, 1,738 members. It was formed in December, 1894, by former members of the Knights of Pythias. These last-mentioned members left the old order, and formed the new, because a convention of the Supreme Lodge Knights of Pythias, in August, 1894, declared that 'henceforth and forevermore the ritual used in this and all other English-speaking countries shall be printed in the English language only.' Both orders are fraternal and benevolent. They have many resemblances. The important difference between them, as already indicated, is this: The ritual of the Improved Order may be printed in German, while that of the Knights of Pythias cannot be. Complainant asks an injunction restraining defendants from using the name 'Improved Order Knights of Pythias,' and from using the name 'Knights of Pythias,' or any derivative thereof, and from printing or using any ritual in substance like that used by the Knights of Pythias.

"There is no proof that the defendants' ritual is so nearly like complainant's as to justify the interference of a court. The sole question is, then, whether defendants shall be enjoined from using the name 'Improved Order Knights of Pythias.' Complainant's counsel insist that by the act incorporating complainant as 'Supreme Lodge Knights of Pythias' an exclusive right to the name 'Knights of Pythias' was acquired. Numerous cases are cited holding that a corporation has an exclusive right to its name. No case, however, is cited holding that incorporation gives an exclusive right to a name already in use, as the name 'Knights of Pythias' was, by an existing voluntary society.

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On the contrary, *McGlynn* v. *Post*, 21 Abb. N. C. 97, cited by complainant's counsel, and *Black Rabbit Association* v. *Munday*, 21 Abb. N. C. 99, hold that in such a case an exclusive right is not acquired. Indeed, if complainant, by incorporating, acquired the exclusive right to the name 'Knights of Pythias,' it could at will compel the order of which it is only the head, and all other lodges, subordinate and grand, to cease using the name 'Knights of Pythias.' It seems clear, therefore, that complainant did not, by becoming a corporation, acquire the exclusive right to the name 'Knights of Pythias,' and that, whatever are its rights, they cannot exceed those of the order of which it is the head.

"The question, then, arises, are the rights of the order violated? Nearly all the members who withdrew from the old order and went into the new are Germans, and many of them are unable to read and understand a ritual not printed in German. Prior to the action of the order which was the occasion of their withdrawal, the order furnished for their use, and they used, rituals printed in German. Defendants therefore withdrew from the society of which they were members, because it changed, not because it continued, its policy. The propriety of the conduct of complainant in forbidding the printing of the ritual in German, the propriety of the conduct of defendants in withdrawing from the order, are questions solely for the consideration of the parties themselves. The Knights of Pythias had a lawful right to declare that its ritual should be printed only in English, and defendants had an equally lawful right to found an order whose ritual might be printed in German. Having formed this order, is it possible that defendants cannot give it an appropriate name, a name which will properly describe it? This new order is formed by the members of the Knights of Pythias who withdrew from the Knights of Pythias because that order changed its policy in a matter which it must be presumed they thought important. This order resembles the Knights of Pythias. It stands to these members in the place which the Knights of Pythias has vacated. To a certain extent it carries out a policy which the Knights of Pythias formerly carried out and abandoned. Complainant charges that the defendants have seceded from it, and have established a rival and very similar organization. No name could appropriately be adopted, under these circumstances, which did not contain the words 'Knights of Pythias,' because no name

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could properly describe it, either by reference to its origin, its history, or its purposes, which did not contain those words. Suppose that this new order had received some other name. It would have been none the less, in the minds of complainant, a seceding faction of the Knights of Pythias; it would have been none the less, to defendants, a substitute for the Knights of Pythias; and it would have been none the less, to the impartial historian, an offshoot of the Knights of Pythias.

"One excellent test of an appropriate name to select under such circumstances is furnished by the history of schisms in other societies. Nearly all our varieties of churches of the same denomination are the result of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church society to adopt as a permanent part of its name the name of the parent organization. Take one instance: A part of the Methodist Episcopal Church withdrew and established the Protestant Methodist Church. So we have the Order of Foresters of America, formerly the Ancient Order of Foresters of America; the Canadian Order of Foresters; the Independent Order of Foresters,—all of which are, as I understand, offshoots of the Ancient Order of Foresters of England. No one has ever questioned the appropriateness of using the parent name as a part of the name of a new society formed under these circumstances, so far as I can learn. To my mind, it is clear, therefore, that defendants, in naming their order, not only could, but were almost bound to, in order to properly describe it, make some use of the words 'Knights of Pythias.' Of course, there is this limitation: Defendants should not use a name so much like the name of the order from which they have withdrawn as to work a damage to that order. The only way that the order can be damaged, as the least reflection will prove, is by depriving it of members who would otherwise join it.

"Let us apply to this case the principles by which courts determine similar controversies of trading concerns. The decisive principle is this: "No man has a right to sell or advertise his own business or goods as those of another.' *Williams* v. *Farrand*, 88 Mich. 478. 'One must not, therefore, adopt a name so similar to that of another as to draw to himself business intended for that other.' *Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Tallcot* v. *Moore*, 6 Hun, 106; *Potter* v. *McPherson*, 21 Hun, 559; *Holmes* v. *Holmes*, 37 Conn. 296 (9 Am. Rep.

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324). The correct principle is stated in complainant's brief (page 71) as a quotation from the opinion of Judge Foster, of the superior court of Vanderburgh county, Indiana, rendered in the suit of *St. George Lodge, K. of P.*, v. *Rosenthal et al.*: 'Where a corporation has appropriated and used a name for such length of time as to become identified by the name, and has established a character and reputation under it, it is a fraud upon the corporation and the public if this name be assumed by others under such circumstances as would lead the public to believe that they constitute the original corporation, and, where injury will result to the corporation on account thereof, courts of equity will, at the suit of the injured parties, by injunction restrain the further perpetration of the wrong. It is the special injury to the party aggrieved and the imposition upon the public that constitute the wrong which the courts will redress. It is not necessary that the wrong should be intentionally committed. It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation.'

"Where one uses the name of another for the fraudulent purpose of attracting to himself business which belongs to that other, no injustice will be done if the court assumes that the name chosen accomplishes this purpose, even though the resemblance be not great. If one intends that the name he has chosen shall be believed to be that of another, it is fair to infer that he will so use that name as to promote the desired belief. Accordingly we find that the motives with which a name is chosen, and the circumstances attending its use, as well as the similarity of names, have a bearing in determining whether business is liable to be diverted, and, consequently, whether the courts shall interfere. Compare *Myers* v. *Kalamazoo Buggy Co.*, 54 Mich. 215 (52 Am. Rep. 811), and *Williams* v. *Farrand*, 88 Mich. 479. See, also, *Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 471. Where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons proceeding with ordinary care, to justify the interference of a court. 2 High, Inj. § 1088; *Seixo* v. *Provezende*, 1 Ch. App. Cas. 192; *McLean* v. *Fleming*, 96 U. S. 251. There is not a particle of evidence in the case that defendants chose

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the name 'Improved Order Knights of Pythias' with the intention that their order should be supposed to be the order Knights of Pythias, nor that they have done anything since the order was founded to lead the public to believe that the orders were the same. On the contrary, the official communications issued by defendants, some of which are set up in complainant's bill, inform all who read them that their order is not the Knights of Pythias, but is a separate, and, they claim, an improved, order. Defendants seem quite as anxious as complainant to have it understood that their order is not the Knights of Pythias. This, then, is the test: Is the name 'Improved Order Knights of Pythias' so nearly like the name 'Knights of Pythias' that ordinary persons using ordinary care would think them identical, would think them two names for the same order, or for branches of the same order, so that they would become members of the defendants' society when they really wanted to join complainant's society?

"In considering this question, it should be borne in mind that no complaint is or can be made on account of any damage resulting from the fact that the defendant society is a rival and a competing organization, and that the founders of an order have the right to claim that their order is superior to any and every other order. It is fatal, therefore, to complainant's case, if the difference of names indicates that defendants' society is a different society (even though it is claimed to be better) from complainant's. The law does not protect the name from any consideration for the feelings of those who bear it. *Day* v. *Brownrigg*, 10 Ch. Div. 294. The sole question is, as already stated, the effect, or probable effect, of the similarity of names, in diverting business. In determining this question, courts do not receive much, if any, aid from adjudicated cases. In the communications of defendants set up in complainant's bill, the name of their society appears as follows: 'Improved Order K. of P.' The name of the complainant is set forth as follows: 'Supreme Lodge Knights of Pythias.' It is the head of the order 'Knights of Pythias.' To me it is self-evident that no careful person could think that these two orders were identical, and, as has been said, in cases of this class the question is whether the similarity is calculated to mislead the ordinary run of mankind. There certainly is just as much distinction between these names as there

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is between that of the Episcopal Church and the Reformed Episcopal Church, or that of the Presbyterian Church and the United Presbyterian Church.

"But we are referred to the case of *Russia Cement Co.* v. *Le Page*, 147 Mass. 206 (9 Am. St. Rep. 685), holding that the introduction of the word 'improved' into the name of the article manufactured by defendant will not justify its use, if, in other respects, its use is unjustifiable. Another case very similar is that of *Hohner* v. *Gratz*, 52 Fed. 871. In the former case it was held an invasion of the rights of the owner of the name 'Le Page's Liquid Glue' to use the name 'Le Page's Improved Liquid Glue.' In the latter case it was held an invasion of the rights of Mr. Hohner, who made and sold harmonicas under his own name, to use the name on harmonicas, 'Improved Hohner.' The distinction between these cases and the case at bar is obvious. In those cases the word 'improved' indicated, not a different glue, but an improved quality of the same glue. One wishing to buy 'Le Page's Liquid Glue' would naturally wish to buy 'Le Page's Improved Liquid Glue.' In the *Hohner Case* the court said, 'The words "Improved Hohner" would signify his (Hohner's) make of a better quality,' and upon this ground an injunction was granted. Now, the name 'Improved Order Knights of Pythias' does not mean, and no one can think for a moment that it does mean, that it is the same order as the Knights of Pythias. Every one who knows enough about secret societies to be qualified to join them knows that a different name of a society means a different society. He would know that the Improved Order Knights of Pythias was not a variety of the order Knights of Pythias. The difference of names would indicate to him possibly a claim on the part of defendants that theirs was the better order, of which he must for himself determine; but certainly that it was a different order. If, in the *Le Page* or *Hohner* case, the names had only indicated that a different article was claimed to be superior to one of similar name, it is obvious that the court would not have interfered. 'Improved' has a different signification when prefixed to the name of an order from what it has when prefixed to the name of an article.

"The case of *St. George Lodge, K. of P.*, v. *Rosenthal*, decided by Judge Foster, of the superior court of Vanderburgh county, Indiana, is more nearly in point. This case was brought by a subordinate lodge Knights of

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Pythias against some of the defendants in this suit, and the same relief was sought that is sought in this suit. That case arose upon demurrer to a complaint. Judge Foster, though sustaining the demurrer on the ground that the cause of action must be enforced by the order Knights of Pythias, in that complaint stated to be a corporation, indicated his opinion, as candidly stated by him, on each question presented. He stated it to be his opinion that the assumption of the name 'Improved Order Knights of Pythias,' under the circumstances alleged in the complaint, was wrongful. I have no criticism to make on this conclusion, nor, with the exception hereafter presented, on the reasoning upon which it is based. The facts alleged in that complaint and the facts established in this case differ radically. It was alleged in that case that defendants, in organizing and naming their society, were seeking to disrupt and defeat the Knights of Pythias. It did not appear, as, in my opinion, it does in this case, that the name 'Knights of Pythias' was in any way descriptive of the new organization. This circumstance is expressly alluded to in the reasoning by which Judge Foster reaches the conclusion that the assumption of the name is wrongful. I must conclude, therefore, that Judge Foster's opinion has no application to the facts established in this case. In speaking of the difference between the name of complainant and defendants' society, Judge Foster said, 'It is established by authorities too numerous to need citation that such a differentiation amounts to nothing.' This is the only statement in Judge Foster's opinion in which I cannot concur. I have already indicated my opinion concerning this difference, and the only cases which it is claimed hold that this differentiation amounts to nothing which I have been able to find, or which eminent counsel brought to my attention, are the cases which I have just tried to show are not in point.

"The best possible evidence that names are sufficiently similar to mislead the public is the fact that the public, or some portion thereof, has been misled. The defendant order was in existence more than a year before the testimony in this case was taken, and yet not a particle of evidence was introduced showing or tending to show that the similarity of names ever misled or deceived any one. This case must be decided, not by citation of authorities, but by answering the question: Would an ordinary person, using ordinary care, wishing to join the Knights

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of Pythias, join the Improved Order Knights of Pythias? For the reasons above stated, I must answer this question, No. A decree will be accordingly entered dismissing complainant's bill."

The decree will be affirmed.

GRANT, HOOKER, and MOORE, JJ., concurred. LONG, C. J., did not sit.

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## SMALLEY *v.* NORTHWESTERN TERRA-COTTA CO.

1. MECHANICS' LIENS—STATUTES—RULE OF CONSTRUCTION.
Mechanics' liens are in derogation of the common law, depending for their existence wholly upon the statute, and therefore, upon the question whether a lien attaches at all, a strict construction of the statute is proper; but, after the lien has once attached, a liberal construction should be put upon the statute, for the purpose of fulfilling its objects.

2. SAME—DIRECTORY PROVISIONS—FILING OF PROOF OF SERVICE.
Failure of a claimant under the mechanic's lien law to file with the register of deeds, before commencing proceedings to enforce his lien, proof of service upon the owner of a copy of the statement of lien, will not invalidate the proceedings as to such owner, where all of the steps to establish the lien have been regularly taken, and the owner's rights have been fully protected.

3. SAME—PLEADING—AMENDMENTS—STATUTE OF LIMITATIONS.
Section 10 of the mechanic's lien law (Act No. 179, Pub. Acts 1891) provides that amendments may be made to any bill or cross-bill at any time before final order. Section 27 provides that amendments to any process, pleadings, or proceedings, either in form or substance, shall be allowed at any time before final decree is rendered, upon such terms as justice may require. *Held*, that an amendment to an answer in the nature of a cross-bill may be allowed in such proceedings, if it seeks, not to introduce a new cause of action, but to state properly the facts which constitute the cause of action set up in the original answer, even though the statute of limitations would bar a new bill.

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4. SAME—ANSWER IN NATURE OF CROSS-BILL.

Section 10 of the mechanic's lien law (Act No. 179, Pub. Acts 1891) requires the complainant in lien proceedings to make all persons having rights affected by the lien claimed, all holding like liens, and all who have filed notice of an intention to claim a lien, parties to the action; authorizes such persons to make themselves parties, on motion and notice to complainant, and to file their intervening or cross bills, or answers claiming the benefit of cross-bills, and notices of *lis pendens* therein; and provides that such cross-bills shall be sworn to, and shall be evidence of the matters therein charged, unless denied by answer under oath. *Held*, that a defendant may obtain affirmative relief against a co-defendant by an answer in the nature of a cross-bill; it being clear that the statute contemplates that all the parties in interest may be brought into court and have their respective interests adjudicated in one proceeding.

Appeal from Wayne; Adams, J., presiding. Submitted April 8, 1897. Decided May 28, 1897.

Bill by William Smalley and others against the Northwestern Terra-Cotta Company, impleaded with Traugott Schmidt and others, to enforce a material man's lien. The defendant company filed an answer in the nature of a cross-bill, to which defendant Schmidt demurred. From an order dismissing the answer in so far as it claimed the benefit of a cross-bill against defendant Schmidt, the Northwestern Terra-Cotta Company appeals. Reversed.

*Warner, Codd & Warner*, for appellant.

*Walker & Spalding*, for appellee Schmidt.

*H. H. & C. H. Hatch*, for appellees Smalley and others.

MOORE, J. The defendant Schmidt, the owner of land in Detroit, in the spring of 1895, contracted with Mr. Gearing, a building contractor, for the erection of a business block thereon. In the fall of 1895, when the building was partially completed, a number of material

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men filed liens against the lot and building for materials which they severally claimed to have furnished to Mr. Gearing. The original bill of complaint in this cause was filed in January, 1896, for the enforcement of one of these liens, and the other lien claimants and the defendant Schmidt, as owner of the land and building, were made defendants. On March 17, 1896, the defendant the Northwestern Terra-Cotta Company, one of the lien claimants, filed an answer in the nature of a cross-bill. praying for the enforcement of its lien, which was filed on the 14th day of November, 1895. To this answer, in so far as it claims the benefit of a cross-bill, the defendant Schmidt filed a general demurrer on the 19th day of March, 1896. On January 2, 1897, the court sustained the demurrer, upon the ground that the answer failed to show that any copy of the statement of lien filed with the register of deeds was served upon the defendant Schmidt, and that it failed to show that any proof of service of a copy of that statement upon said defendant Schmidt was filed in the office of the register of deeds before the institution of proceedings to enforce the lien. The order gave leave to amend. Upon the same day an amended answer was filed, setting up the service of a copy of the statement upon Schmidt on the 22d day of November, 1895, and averring that on the 11th day of December, 1896, proof of that service by affidavit was filed in the office of the register of deeds. Immediately upon the filing of this amended answer, a demurrer thereto was filed, setting up the following grounds of demurrer:

1. That the order permitting the filing of this amended answer in the nature of a cross-bill, and the filing thereof, were unauthorized and unwarranted by law, because the order itself was made and the amended bill was filed more than six months after the time when the statement of the lien of the Terra-Cotta Company was filed with the register of deeds.

2. Because the proof of service of said statement of lien upon the defendant Schmidt, as averred in said amended

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answer in the nature of a cross-bill, was filed with the register of deeds more than six months after the time when the statement of lien was filed, and after the filing of the original answer in the nature of a cross-bill for the enforcement of said lien.

3. Because the court had no power, under an answer in the nature of a cross-bill, to grant to the defendant filing such answer any relief against a co-defendant or against the property of such co-defendant.

Upon the same day, January 22, 1897, this demurrer was sustained, and the amended answer in the nature of a cross-bill, in so far as it claims the benefit of a cross-bill against the defendant Schmidt and his property, was dismissed. From this order the Terra-Cotta Company takes the present appeal. No demurrer or other objection was filed by any other person than defendant Schmidt to this answer in the nature of a cross-bill.

It is the claim of appellee Schmidt that the law makes the following things necessary conditions precedent to the taking of proceedings for the enforcement of a lien by any person not contracting directly with the owner:

1. Filing with the register of deeds a statement of lien within 60 days after the last furnishing of labor or material.

2. Service upon the owner or his agent, personally, of a copy of the statement within 10 days after the filing, or, if neither owner nor agent can be found within the county, service by posting on the premises within 5 days more.

3. Filing proof of such service with the register of deeds before the commencement of proceedings to enforce the lien.

He contends that, as the taking of these steps is made by the statute prerequisite to the enforcement of the lien, the performance and the averment of performance of each of them are necessary allegations in any bill to enforce such a lien, and that, as an original bill could not be filed for that purpose more than six months after the lien was filed, neither could a bill filed within six months, but omitting any of these necessary allegations, be so amended as to include them after the six months had ex-

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pired. It will be observed that the amended answer shows that all these conditions were performed, except the filing of the proof of the service of the notice with the register of deeds, before the commencement of the proceedings to enforce the lien. The question, then, is whether, when all the steps to establish a lien have been taken, except the filing with the register of deeds of proof of service of the statement of lien on the owner before commencing proceedings to enforce the lien, the proceedings must fail.

It is the contention of the appellee that, as this is a proceeding in derogation of the common law, the statute must be strictly construed, and, as the pleadings do not show a compliance with the law, the proceeding must fail. It is admitted on the part of the appellant that, as to all those requirements of the statute necessary to create the lien, the statute is mandatory, and must be followed; but it is claimed that, after the lien is once established, its provisions are directory, and that if such steps are taken as fully protect the owner, as in this instance, by giving him notice of the claim within the time fixed by statute, he is not harmed, and cannot complain.

It has long been the settled law in this State that these proceedings are purely statutory, and that, to create a lien under them, the statute must be followed in all its essentials. *Wagar* v. *Briscoe*, 38 Mich. 587; *Peninsular General Electric Co.* v. *Norris*, 100 Mich. 496; *Hannah & Lay Mercantile Co.* v. *Mosser*, 105 Mich. 18. In the case of *Sheridan* v. *Cameron*, 65 Mich. 680, which was a proceeding to enforce a mechanic's lien, where the proceedings were attacked on the ground that they were prosecuted too late and irregularly, the petition was filed within the 60 days allowed by statute, but it did not contain a prayer for process. The notice of *lis pendens* was filed after the 60 days expired. It was claimed that for these reasons the proceeding must fail. In discussing the case, Justice CAMPBELL said:



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"The plea does not set up a failure to file notice of *lis pendens* as a defense, and it is not, therefore, in issue; but, taking the whole statute together, it seems that its chief purpose is to bind subsequent interests, and to serve the same purpose as notices of *lis pendens* under the general chancery practice. At all events, no other purpose is indicated on the face of the statute, and it hardly seems necessary as against the original parties to the bill, unless, possibly, during the interval before service of process or other notice to come in. * * * The claim made that the lien law is to be rigidly construed is not correct, in the full extent claimed. There is no doubt that a purely statutory lien must conform exactly to the statutory conditions; but when it once attaches, and is put in process of foreclosure, the proceedings, while in part definitely fixed, are nevertheless in important particulars left to the general course of practice. No construction should be strained at in order to defeat them, but the rights of all parties should be harmonized and respected as far as is reasonably practicable."

In the case of *Mouat* v. *Fisher*, 104 Mich. 262, the lienor, instead of serving notice on the landowner, obtained from him an acceptance of service. It was claimed by the landowner that the statutory requirements had not been complied with, and the proceeding must fail. It was held that, where the landowner has accepted service in lieu of the statutory service, he should not be heard to complain that the statutory steps were not taken, and the decree of the court below was affirmed.

In *De Witt* v. *Smith*, 63 Mo. 263, it is said:

"The courts at one time were inclined to hold that enactments for mechanics' liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefits; but the better doctrine now is that these statutes are highly remedial in their nature, and should receive a liberal construction, to advance the just and beneficent objects had in view in their passage. Their great aim and purpose is to do substantial justice between the parties, and this should never be lost sight of in giving them a practical construction. * * * The object of the law, so far as securing the validity of the lien against the owner is concerned, when a material

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man seeks to avail himself of the advantages, is that, by the notice, the owner may keep back enough of the contract price to indemnify himself against the liability."

In that case it was held that, as between the mechanic and the owner, the lien would not be defeated where the property was described as a three-story brick building on lots 19 and 20, block No. 2, when it should have been block 20, when the evidence disclosed the owner had no other three-story building for which material was furnished by the mechanic, and that he owned no other lots than those in block 20.

In *Maynard* v. *Ivey*, 21 Nev. 241, it is said:

"The right to liens given to mechanics and laborers is introduced into the statutory law of the States by positive statutes. These statutes were at first looked upon by the courts to be in derogation of the common law, and hence they were strictly construed. They have now, however, become an integral part of our law, and their justice and beneficence have become so apparent that it was not intended by the legislature that laborers' lien statements should be strangled by technicalities, but, being remedial in their nature, they were to receive a broad and liberal construction."

In *Bullock* v. *Horn*, 44 Ohio St. 420, in construing the lien law of that State, this language was used:

"The statute is highly remedial in its character, and should receive such liberal construction as will carry out the purpose of the legislature in its enactment. The labor of the workman and the material of the material man having contributed to the erection of the structure,—having, indeed, created in part the very property on which the lien is sought to be attached,—the purpose of the law is to give to such parties the right, where the contractor refuses to pay, to be paid for their labor and material out of the fund which has been earned under the contract, and out of the structure and the land upon which it stands; such claim, as to amount, not to be in excess of the claim of the contractor, as measured alone by the contract and his performance of it."

And it was held the statute should be given such a construction as would carry out its object.

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It may be difficult to harmonize all of the language in these decisions. It seems to me, however, that the rule is correctly stated in 2 Jones, Liens, § 1554, where it is said:

"The rule of construction applicable to questions arising under these liens may be strict at one stage of the proceedings, and liberal at another. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon statutes, and therefore, upon the question whether a lien attaches at all, a strict construction is proper."

Section 1556 of the same author reads:

"But, after the lien has once attached, a liberal construction should be put upon the statute, for the purpose of fulfilling its objects. The statute is highly remedial in its nature, and should receive a practical and reasonable construction to effect its objects."

All of the proceedings required by the statute to create a lien, up to the time when proceedings were about to be instituted to enforce the lien, had been taken. The statute does not require the filing of proof of service of notice in order to establish the lien, but simply makes that a prerequisite to the proceedings to enforce the lien. The object of a notice to the landowner is to prevent him from paying the principal contractor. *Lamont* v. *Le Fevre*, 96 Mich. 177. The notice having been given to the landowner within the time required by statute, it is difficult to see how he is harmed by a failure to file proof of service of notice upon him with the register of deeds. The case would be very different if he were an intervening lienor or a subsequent purchaser. He had all the notice that it was possible to give, and I do not see how he can complain of a failure to file proof of the service of a notice upon him with the register of deeds. I think all of the essentials of the statute, so far as they relate to him, have been met. Applying the principles of construction just stated to this case, I am convinced that, if the amended answer was filed in time, the demurrer to it ought to have been overruled.

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It is conceded that the original answer was filed in time, but it is insisted it was not proper to allow an amendment to it, and that the amendment came too late. As to the objections to the allowance of an amendment to the answer in the nature of a cross-bill: The amendment was in relation to facts which existed at the time when the original bill was filed. The statute evidently contemplates such amendments. Section 10 of the act provides:

"Amendments may be made to any bill or cross-bill at any time before final order, and, if it shall appear that any party has had insufficient notice of any such [proceedings] proceeding, such further notice shall be given as the court shall think just." Act No. 179, Pub. Acts 1891.

It will be observed this section provides for further notice any time before the final order is made, if such notice is made necessary by the amendment.

Section 27 provides:

"Amendments to any process, pleadings, or proceedings in such actions to enforce the liens given by this act, either in *form or substance*, shall be allowed at any time before final decree is rendered, on application of either party, upon such terms and conditions as justice may require."

The counsel for Mr. Schmidt contend that, where the statute of limitations has run against the cause of action since the commencement of the suit to enforce it, no amendments to the pleadings introducing any new averments will be allowed,—citing *Gorman* v. *Newaygo Circuit Judge*, 27 Mich. 138; *Michigan Central R. Co.* v. *Kalamazoo Circuit Judge*, 35 Mich. 227; *Wingert* v. *Wayne Circuit Judge*, 101 Mich. 395. An examination of these cases will show that the amendments proposed, in each instance, a new and distinct cause of action, while the amendment allowed in the case at bar does not seek to introduce a new cause of action, but to properly state the cause of action which was not sufficiently stated in the original petition. This was allowable under the sections just cited. See *Burk* v. *Muskegon*

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*Machine & Foundry Co.*, 98 Mich. 614; *Steel Brick Siding Co.* v. *Muskegon Machine & Foundry Co.*, Id. 616; Phil. Mech. Liens, § 429; *Willer* v. *Bergenthal*, 50 Wis. 474; *Huse* v. *Washburn*, 59 Wis. 414; *Pratt* v. *Montcalm Circuit Judge*, 105 Mich. 499.

As to the objection that an answer in the nature of a cross-bill is not allowed in a proceeding of this kind, it may be said that section 10 of the lien law provides as follows:

(*a*) "The complainant shall make all persons having rights in said property affected or to be affected by such liens so filed in the office of the register of deeds, and all persons holding like liens so filed, and those having filed notice of intention to claim a lien, parties to such action.

(*b*) "And all persons holding like liens, or having filed notice of intention to claim a lien, or any other persons having rights in said property, may make themselves parties thereto on motion to the court and notice to complainant, and may file their intervening or cross bills, *or answers claiming the benefit of cross-bills*, and notices of *lis pendens* therein.

(*c*) "Intervening or cross bills shall be on oath, and all bills sworn to shall be evidence of the matters therein charged, unless denied by answer under oath."

We think the purpose of these provisions of the statute in relation to the pleadings is to provide a practical method by which all the parties in interest can be brought into court and have their respective interests adjudicated in one hearing and in one proceeding. There is no incongruity in providing for an answer in the nature of a cross-bill which shall perform the office of a cross-bill. We can see no particular merit in requiring two pleadings upon separate papers when one will do as well. Evidently the legislature was of that opinion, as indicated by the legislation upon that subject. The pleadings in that respect are unobjectionable. Story, Eq. Pl. § 392; Puter. Mich. Ch. 322; *Feige* v. *Babcock*, 111 Mich. 538; *Thielman* v. *Carr*, 75 Ill. 385.

The demurrer should have been overruled.

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The decree is reversed, and defendant Schmidt is given 20 days in which to answer. Appellant is given costs of this court.

The other Justices concurred.

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## MASON v. WIERENGO'S ESTATE.

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s67 ABR 461
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1. LANDLORD AND TENANT—HOLDING OVER—ACT OF GOD.
The fact that a tenant for a term of years becomes seriously ill shortly before the expiration of his term, and after removal operations have actually begun, does not deprive the landlord of his right to treat the tenant's failure to complete the removal before the lease expires as a renewal of the lease for another year.

2. SAME—INTENT—ELECTION OF LANDLORD.
The right of a lessor to treat a lessee who holds over after the expiration of his term as a tenant, and not a trespasser, is not affected by the fact that the lessee had no intention of renewing his lease.

Error to Muskegon; Russell, J. Submitted April 9, 1897. Decided May 28, 1897.

Lyman G. Mason presented a claim for rent against the estate of Andrew Wierengo, deceased. The claim was disallowed by the commissioners, and claimant appealed to the circuit court. From a judgment for part of the amount claimed, on verdict directed by the court, claimant brings error. Reversed.

*Arthur Jones*, for appellant.

*Bunker & Carpenter*, for appellee.

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HOOKER, J. The plaintiff, being owner of a building, leased the same for a term of years, at an annual rental, to Wierengo, who occupied it as a store. A short time before the expiration of the lease, Wierengo rented another building, and informed the plaintiff that he should vacate the building owned by him at the expiration of the lease. Preparation for removal began September 19th, and actual removal began before September 26th. Counsel for the defendant claim that the lease expired October 1st, at midnight. On September 26th, after the removal began, Wierengo was taken sick. The work of removal was continued by his clerks, but was not finished until October 11th. Mr. Wierengo died on the 6th of October. Under these circumstances, counsel for the defense assert that the presumption of a renting for another year is rebutted. They also contend that it was made impossible for Wierengo to vacate, by the act of God.

If it is contended that the act of God excuses one from the performance of his express contract to yield possession at the expiration of his lease, we are unable to acquiesce in the contention. It is only in those contracts which the act of God renders impossible of performance—as where the subject-matter of the contract dies, or is destroyed, or where personal labor is contracted for, and the person dies or becomes incapacitated through the act of God—that a party is excused from performance. See Beach, Cont. § 217, where this question is discussed, and 1 Am. & Eng. Enc. Law (2d Ed.), 588–592, where a large list of authorities confirm this doctrine. If, therefore, the sickness of Mr. Wierengo has any bearing upon the case, it is as a circumstance bearing upon the question of the rebuttal of the presumption.

Counsel urge strenuously that the presumption of an intention to renew the lease for a year arising from holding over is not conclusive, but that it may be rebutted. As a matter of fact, undoubtedly it may; but it is not so clear that it would constitute a defense against the claim of a landlord who should acquiesce, and elect to treat the

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holding over as a renewal of the lease for a year, rather than as a trespass. In the absence of qualifying circumstances implying consent to a holding under some new arrangement, the holding over is a legal trespass, and does not depend upon the intention of the tenant. It is a wrongful holding, whatever the cause, though perhaps not culpable in a moral sense, and the rights of the landlord are definitely fixed by the law. This question was reviewed in *Campau* v. *Michell*, 103 Mich. 623, and the opinion of the court as there indicated was contrary to the defendant's position in this case. That case was exceptional, in that the defendant's tenant was induced to hold over by the mistake or misconduct of the plaintiff's agent, and the doctrine of estoppel was applied. See, also, *Bradley* v. *Slater*, 50 Neb. 682.

We think that there is uniformity in the decisions against the contention that the intention to vacate as soon as possible can affect the right of the landlord to elect to treat the holding over as a renewal of the lease for a year. It requires some express or implied consent upon his part to a holding over upon other conditions. This is wanting here. Counsel urge the hardship of the application of the rule in this case, but we cannot say that there is or is not hardship, or that we would be justified in imposing a burden upon the plaintiff to relieve the defendant from a legal obligation. He appears to have tried to rent the place, and has given defendant credit for what he has been able to derive from the building. Had Wierengo lived, he might have made the same claim if asked to pay the rent for another year, but it would not have relieved him. The situation, as it is, only differs in the degree of inconvenience, intensified as it is by the death of Wierengo, and the change in his affairs naturally resulting. It is unfortunate for his representatives that the store was not vacated, but we discover no legal reason for lifting the burden of misfortune from them, and imposing it upon another, who is in no way responsible for it.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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## MORCH *v.* TOLEDO, SAGINAW & MUSKEGON RAILWAY CO.

RAILROAD COMPANIES — FELLOW-SERVANTS — VICE PRINCIPAL — FOREMAN OF WORK TRAIN—NEGLIGENCE.

A road-master, being prevented by illness from accompanying a work train sent out to distribute railroad ties along the right of way, placed a section foreman in charge of the train, with instructions as to the loading, removing, and handling of the ties. No general power was conferred upon the foreman to make up and send out trains, to determine when and where they should go, to employ and discharge workmen, or to represent the road-master other than upon the particular occasion, and in accordance with his instructions. *Held*, that the foreman did not become a vice principal of the company, so as to render it liable for injuries to one of the workmen resulting from the negligence of the foreman while in charge of the train.

Error to Muskegon; Russell, J. Submitted April 9, 1897. Decided May 28, 1897.

Case by John Morch against the Toledo, Saginaw & Muskegon Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

*Geer & Williams* (*E. W. Meddaugh*, of counsel), for appellant.

*Chamberlain & Cross* (*Turner & Turner*, of counsel), for appellee.

MOORE, J. The plaintiff sued defendant to recover for severe personal injuries received by him while he was in the employ of defendant, and recovered a judgment, from which defendant appeals. The avocation of plaintiff was that of a section hand on defendant's road. At the time he received his injuries he was standing upon the steps

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or platform of the front end of the caboose, which was attached to a train consisting largely of flat cars loaded with ties. The train was in motion. The men would throw one end of the tie off the train, and the motion of the train would carry the other end of the tie forward, until the tie would drop upon the roadbed. Some of the ties would drop in such a way as to be dangerously near the track. Upon the day in question, the plaintiff had jumped from the front end of the caboose, thrown a tie back, and got on at the rear end of the caboose, gone through the car, and was in a position to get off again, should occasion require. His claim is that the speed of the train was quickened so as to make it unsafe to get off, and unsafe to throw the ties, and that, while so standing there, one end of a tie was resting on the ground, and the other end came against his leg and crowded him against the car, resulting in his loss of a leg and other serious injuries.

The declaration alleges that the train was in charge of a road-master, or an assistant road-master, who represented the master, and that, while following his directions, the injury occurred. It is the claim of plaintiff that the train was in charge of Philander Schuman, who was then acting in the capacity of road-master; that the plaintiff was acting under his orders; that it was by the direction of Mr. Schuman that the speed of the train was increased, making the work so hazardous as to result in the injury to the plaintiff. The important question, then, is, in what capacity was Mr. Schuman acting? The road-master was Mr. Raynor. The road had no officer who was designated as an assistant road-master; but it is claimed that the character of the duties of Mr. Schuman was such as to make him the representative of the road for the day, and that for the purposes of this case he must be treated as an assistant road-master. The record discloses that the usual employment of Mr. Schuman was foreman of section 6 at Greenville. He had three or four men under his charge, with the right to discharge them

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for cause, and hire other men in their places. Mr. Schuman lived in Greenville. The road-master, Mr. Raynor, also lived at Greenville. He had been sick at times, and at the time of the accident was sick at Greenville.

Upon the morning of the day of the accident, Mr. Raynor sent Mr. Schuman out with the train upon which plaintiff was hurt. He gave him instructions in relation to the loading, removing, and handling of the ties, and it was Mr. Schuman's duty to report to Mr. Raynor in the evening what he had done. Mr. Schuman had been sent by Mr. Raynor with the train upon a number of occasions before this, receiving his instructions before he started out, and reporting what he had done upon his return. The trainmen consisted of the engineer and fireman, a conductor, and one or two brakemen, and three or four section foremen and their section men. It was the duty of the trainmen to handle the train, and the duty of the section foremen and the section men to handle the ties. When the ties were distributed upon a given section, the foreman of that section indicated what ties, and how thickly he wanted them distributed; and I think the record fairly discloses that he communicated his desires to Mr. Schuman, and he in turn indicated to the conductor any change desired in the speed of the train, to facilitate the distribution of the ties. I think, too, the record fairly discloses that Mr. Schuman was authorized to direct the movements of the train for the time during which he had charge of it. Does that make him vice principal? He had no right to direct when a train should be made up and sent out. The road-master had such right. He had no right to determine where the train should go, and when, except as he received his instructions from the road-master. The road-master had the right to determine both these things. Mr. Schuman had no right to hire or discharge any men except the three or four men employed on his section (though the plaintiff says he heard him say he had such author-

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ity). The road-master had authority to employ and discharge men. Mr. Schuman had no authority outside of his work as section foreman, except what was conferred upon him, for the time being, by Mr. Raynor, the road-master.

It is true, Mr. Schuman had charge of the train when the accident occurred, but does that make him a vice principal? Where a number of men are employed, some one must be at the head of them. A section gang must have a foreman. A bridge gang must have some one in authority. Freight trains must be in charge of some one who must be obeyed. He is usually known as a conductor. Where concert of action is required, there must be some one who has authority and control over the others. It does not follow from that, however, that the one occupying a superior position to another, with the right to give instructions which must be obeyed, is a vice principal. *Quincy Mining Co.* v. *Kitts*, 42 Mich. 34. It has been repeatedly held that a foreman of a section gang and the section men are fellow-servants. *Hammond* v. *Railway Co.*, 83 Mich. 334; *Timm* v. *Railroad Co.*, 98 Mich. 226. It has been held that the conductor, engineer, and other employés of freight trains are fellow-servants. *Stanley* v. *Railway Co.*, 101 Mich. 202. The case at bar is unlike the cases cited by counsel for plaintiff. In the case of *Harrison* v. *Railroad Co.*, 79 Mich. 409 (19 Am. St. Rep. 180), the train was in charge of the assistant road-master, who had general charge of a division of the road. In the case of *Erickson* v. *Railway Co.*, 93 Mich. 414, the train was in charge of one who had full charge of it, and complete control over every one employed, with full power to hire all laborers employed; to whom alone they could make complaint. In the case of *Palmer* v. *Railroad Co.*, 87 Mich. 281, the work was under the direction and control of the assistant road-master. The case at bar is not so strong a case against the defendant as *Schroeder* v. *Railroad Co.*, 103 Mich. 213, in which this court held that the plaintiff could

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not recover. We think the last-named case disposes of this one.

Judgment is reversed. No new trial ordered.

The other Justices concurred.

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## DOUVILLE *v.* FARMERS' MUTUAL FIRE INSURANCE CO. OF SAGINAW COUNTY

1. INSURANCE—DEFENSES—WAIVER.

An insurance company, by placing its refusal to pay a loss solely upon the ground that the policy had been canceled, waives its right to assert as a defense to an action thereon that the insured had not submitted his claim to arbitration, that he was not the owner of the property insured, or that he had failed to disclose incumbrances.

2. SAME—MUTUAL COMPANIES—BY-LAWS—CANCELLATION OF RISK—PUBLIC POLICY.

The power conferred upon the directors of a mutual fire insurance company by 1 How. Stat. § 4253, to make such by-laws, not inconsistent with the Constitution and laws of the State, as may be deemed necessary for the government of its officers and members and the conduct of its affairs, authorizes a by-law requiring the secretary to cancel any risk which, in his opinion, is unsafe; and such by-law is not contrary to public policy.

3. SAME—SCOPE OF CONTRACT.

The by-laws of a mutual insurance company are a part of the insurance contract, as binding upon the member as the policy itself.

Error to Saginaw; Kendrick, J. Submitted April 13, 1897. Decided May 28, 1897.

*Assumpsit* by Henry Douville against the Farmers' Mutual Fire Insurance Company of Saginaw county on a policy of insurance. From a judgment for plaintiff on

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verdict directed by the court, defendant brings error. Reversed.

*D. P. Foote*, for appellant.

*Crane & Crane*, for appellee.

MOORE, J. On the 27th of April, 1895, the defendant company issued to the plaintiff a policy of insurance upon a house and contents and barn and contents belonging to the plaintiff. In the policy it is stated that the buildings were on section 31. The policy contained a clause reading as follows:

"The said company have the right to cancel any policy whenever the board of directors shall deem there is sufficient cause therefor. In such case the secretary shall give the party insured, and the party to whom this policy is payable in case of loss, notice in writing or otherwise of the determination of the company to exercise this right, and upon such cancellation the secretary shall pay such member an equitable proportion of the funds remaining after payment of all losses and debts then due."

A by-law of the company, a copy of which was contained on the back of the policy, reads as follows:

"The secretary is instructed to cancel each policy whose holder has not paid his assessment for a period of 30 days after the expiration of the time stipulated for such payment; also every risk which, in his opinion, is unsafe," etc.

The policy also contained a provision reading as follows:

"No suit or action at law or in chancery shall be commenced or maintained against this company by reason of this policy, but all questions of dispute arising between this company and the assured, or any person claiming under him, her, or them, shall be settled by arbitrators or referees, subject to the charter and by-laws, and their award in writing shall be binding upon the parties, and final."

Section 23 of the charter provides:

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"In case of loss by fire, it shall be the duty of the board of directors, or some one or more of them, with the approval of a majority of them, to visit the place of the fire, to ascertain by evidence, under oath, the liability of the company, and the amount thereof; and in case of any disagreement between the board and the loser, either as to liability in whole or in part, said board shall select a suitable and disinterested person, not a member of said company, residing in said county of Saginaw, and in some town other than the one in which the loser shall reside, to act as referee; the loser shall choose another like situate as above, and the two referees so chosen may select a third," etc.

By-law No. 10 provides:

"All applicants for insurance shall state the amount of incumbrance on the premises whereon the property to be insured is situated."

The record discloses that the insurance was effected through Mr. Thomas, who knew the premises. Mr. Thomas filled out the application blank. The application is silent upon the question of incumbrance and the value of the property. Plaintiff says, if Mr. Thomas asked him about the incumbrance, he stated to him just what the facts were. The wife of the plaintiff says that Mr. Thomas did ask about the incumbrance, and was told the amount of it. The buildings were not on the description of land stated in the policy. The testimony is that Mr. Thomas was familiar with the premises, saw the buildings, and was furnished with a tax receipt, for the purpose of getting a description of the premises. The premises had been insured about three years before the policy sued upon was issued.

On the night of July 25, 1895, a loss by fire occurred at the house covered by the policy. The fire was set under the house. The plaintiff thought it was set by a neighbor. There is testimony tending to show that when the officers of the company were adjusting this loss, the last of July or the first of August, they notified him there was an assessment due on his policy, and he would find

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notice of it in the post-office. This assessment was made in July, and amounted to $2.74. Notice of the assessment was sent August 1st, and on the 3d of August was paid by plaintiff. The secretary of the company testified that the payment of this amount would put the plaintiff in good standing until July, 1896, though he also testified that the company had notes out that would amount to as much as the money it had on hand. On the 6th of August the secretary sent notice to the plaintiff that his policy was canceled, which notice was received by plaintiff a few days thereafter. On the 16th day of August the barn and contents were burned. The plaintiff at once notified the secretary of the company of his loss. The secretary then told him that the company was not liable, as his policy had been canceled, and the officers of the company refused to send any adjusters to view the premises. August 24th, Mr. Crane, an attorney, appeared before the officers of the company, and asked them to adjust the loss. They denied that there was any liability against the company, upon the ground that the policy had been canceled. He then made a written demand upon them as follows:

"SAGINAW, August 24, 1895.

"FARMERS' MUTUAL FIRE INS. CO., Saginaw, Mich.,
To HENRY DOUVILLE, of Hemlock, Mich., Debtor.

"To loss under certificate number 1,710 on account of fire which occurred on the night of August 16, 1895, by which the assured lost barn and shed; also granary; also his hay and grain in said barn and stacks; also some farm implements,—all of which the assured insists is a valid claim against the company, and asks that the same be adjusted according to the terms and conditions of said certificate.

"HENRY DOUVILLE,
"By W. E. CRANE, His Attorney."

The attorney of Mr. Douville was then told that the company denied there was any liability, and if the by-law was of no force they wanted to know it, and



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Douville could sue as soon as he had a mind to. Later the officers of the company caused this letter to be sent:

"TREASURER'S OFFICE, SAGINAW, MICH., Sept. 14, 1895.
"MR. WILLIAM E. CRANE.

"*Dear Sir:* Yours of the 6th received, and I have this day presented it to the board of directors. In regard to the loss or damage to the house, we are liable, and will settle with H. Douville when he will sign a receipt. On barn and contents we are not liable.

"Yours truly,
"LEWIS LISKOW, Sec."

Suit was brought by plaintiff, October 1, 1895. The defendant pleaded the general issue, and gave notice that plaintiff was not the owner of the property described in the insurance policy; *second*, that said policy had been canceled; *third*, that the application for insurance contained a statement that there was no incumbrance upon the property, when, in fact, there was an incumbrance of $500. The testimony of Mr. Thomas, who took the insurance, tended to show that the buildings he insured in 1895 were located just the same as those he insured in 1892, and that the long 40 was worth $2,500, and that an incumbrance of $500 would not cause him to reject the property for insurance, if he had known of the incumbrance. Upon the trial of the case it was insisted, in addition to the defenses set up in the pleadings, that this suit could not be maintained, for the reason that the policy of insurance provided that no suit or action at law should be commenced against the company by reason of this policy. After the testimony was all in, the defendant requested the court to direct a verdict in its favor. The court declined to do this, and instructed the jury to return a verdict in favor of the plaintiff for the amount claimed by him. Defendant appeals.

It is claimed on the part of the plaintiff that the only defense which can be urged by the company is that prior to the loss the policy had been canceled, as that is the only reason that the company gave to the plaintiff or his coun-

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sel before suit was brought why the loss was not paid; that, upon the ground of waiver and estoppel, it is now precluded from taking any other position. The record discloses very clearly that, whenever anything was said to any of the officers of the company about settling or adjusting the loss, they insisted the company was not liable, and assigned as a reason why it was not liable that the policy had been canceled. It was their contention that by-law 17 authorized the secretary of the defendant to cancel the policy; that he had done so; that the plaintiff had notice of the cancellation, and the officers of the company desired to know whether the by-law had any validity or not, and said to the plaintiff, in substance, that if he thought he had a claim he had better sue it. No suggestion was made at any time before suit that the policy required the claim to be arbitrated, or that the buildings insured were not the property of the plaintiff, or that it was incumbered. The refusal to pay was based solely upon the ground that the policy had been canceled. It is said in Herman on Estoppel and Res Judicata:

"Requirements that are for the benefit of the company may be waived or modified by the company; and it is well settled, both upon principle and authority, that if a party insured calls upon the insurer to pay his loss, and the latter makes no specific objection to the form or sufficiency of such proofs of that loss as are offered, * * * but declines to pay the claim upon other and different grounds, specifying them, it will be estopped from thereafter setting up defects in the proof of loss as a defense to the claim, being presumed to have waived them. Generally, a refusal by the company to pay, or a denial of its liability, before any preliminary proofs are made as required on the face of a policy, whereby the insured is induced not to comply with the conditions of the policy in that respect, is in law a waiver of the conditions of the policy requiring such proofs to be made. * * * The doctrine that an insurance company, by putting its refusal to pay the loss upon a definite ground, different from a want of preliminary proofs, or of defect in their form or substance, waives the right to insist upon the failure to make such proof as a defense to an action on

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the policy, is in harmony with the elementary principle that a party who places his refusal upon one ground cannot, after action, change it to another and different one." 2 Herm. Estop. & Res. Jud. §§ 1210, 1211; *O'Brien* v. *Insurance Co.*, 52 Mich. 131; *Towle* v. *Insurance Co.*, 91 Mich. 219; *Lum* v. *Insurance Co.*, 104 Mich. 397.

As was said in *Towle* v. *Insurance Co.*, when the defendant was asked to adjust this loss, good faith required that the company should apprise plaintiff fully of its position, and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of the plaintiff. We think the only question open to it is whether or not the policy had been canceled at the time of the fire.

It is claimed on the part of the plaintiff that the secretary had no authority to cancel the policy. It is said the act of cancellation can be exercised only by the board of directors; that, as a condition precedent thereto, the company must account with and pay to the insured his unearned premium before cancellation. In relation to the return of the unearned premium, it may be said the record discloses that there was no unearned premium to return. The liability of the company at the time this policy was canceled was in excess of the money on hand. The statute under which this company was organized (1 How. Stat. § 4253) provides, in express terms, that the corporators or trustees or directors shall have power to make such by-laws, not inconsistent with the Constitution and laws of this State, as may be deemed necessary for the government of its officers and members and the conduct of its affairs. Section 7 of the charter provides:

"The board of directors shall have power to make and adopt such by-laws, not inconsistent with the Constitution and laws of the State of Michigan or with this charter, as they may deem necessary for the government of said company and members and the conduct of its affairs, which said by-laws the members of the company shall be bound to observe."

We have already quoted the provision of by-law 17, and we find nothing in its provisions inconsistent with

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the charter provisions or the statutory provisions heretofore quoted. The by-law appeared upon the certificate of insurance issued in this case, and it is to be presumed the insured had notice of it. It has been repeatedly held that when a policy of insurance is effected in a mutual insurance company, the insured becomes a member of the corporation, and is bound by its charter and by-laws. The by-law is as much a part of the contract of insurance, and as binding upon the member, as the policy itself. *Becker* v. *Insurance Co.*, 48 Mich. 610; *Borgards* v. *Insurance Co.*, 79 Mich. 440.

It is urged that this by-law was contrary to public policy. It is difficult to see upon what ground this objection can be urged. A condition of things can readily be imagined when a risk becomes so hazardous that, in the interest of the insurance company, it ought to be canceled, and canceled quickly. This by-law was evidently adopted to meet just such an emergency. By becoming a member of the company the insured assented to the by-law, and, we think, is bound by it. A careful examination of the record discloses such a condition of things that we think it was the duty of the learned judge to direct a verdict for the defendant.

Judgment is reversed, and no new trial ordered.

The other Justices concurred.

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## MIOTKE *v.* MILWAUKEE MECHANICS' INSURANCE CO.

1. INSURANCE—REPRESENTATIONS AS TO TITLE.
   The statement of an applicant for insurance, that he holds the property sought to be insured on contract, does not, in itself, amount to a misrepresentation of his interest, although the contract runs to himself and wife.

2. SAME—WAIVER OF CONDITIONS—ESTOPPEL.
   The conditions of an insurance policy may be waived by the company, not only by express agreement, but by conduct which amounts to an estoppel.

3. SAME.
   Where an insurance company employs, as a solicitor of insurance, a foreigner who is not possessed of a sufficient knowledge of the English language to enable him to fill the blanks in his daily report, and the solicitor, having secured the application of a foreigner of a different nationality, with whose language he is likewise unfamiliar, leaves blank the space designed to show the holding of the applicant, being advised by his superior that, if the blanks are not filled, he will "fix it over," and the company accepts the consideration and issues the policy, it will be estopped to assert, after a loss, that it took it for granted that the blank indicated title in the applicant by deed, and will be held to have contracted to insure the interest which the applicant actually had, notwithstanding a provision in the policy that it should be void if the interest of the insured were other than unconditional and sole ownership.

4. SAME—INSURABLE INTEREST—HUSBAND AND WIFE.
   A husband has an insurable interest in real property held under a contract running to himself and wife jointly, and the amount of his recovery does not depend upon the loss to his individual interest, but on the damage accruing to whatever interests are covered by the policy, where the wife authorized or ratified his act in procuring the insurance.

Error to Wayne; Hosmer, J. Submitted April 13, 1897. Decided May 28, 1897.

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*Assumpsit* by Frank Miotke against the Milwaukee Mechanics' Insurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

*Wilkinson & Post*, for appellant.

*Morse Rohnert*, for appellee.

HOOKER, J. The plaintiff is a Polander, who is unable to write or speak the English language. He was approached by the defendant's solicitor, who proposed to insure his house, and he finally consented to allow him to do so. When he was asked to insure, he at first declined, saying that he had the place on a contract, which was not paid up, and he needed his earnings to pay upon it. Again, the solicitor says that he inquired what title he had, and plaintiff said that he had it on contract, and that he (the solicitor) so informed his superior before the policy issued. There was no written application. A loss occurred, and an interview was had, and the amount of loss was agreed on, and proofs of loss were prepared by the agent in conformity thereto. At this time it became known to the agent that the contract ran to the plaintiff and his wife jointly. The agent testified that this was the first knowledge that he had that the place was held upon contract, while the solicitor testified that he so informed him at the time the insurance was effected. It seems undisputed, however, that nothing was said or known by either in regard to the wife's relation to the contract previous to the making of proofs of loss. This discovery was followed by a denial of liability by the defendant, and a transaction in which the plaintiff was paid $200. The defendant claims this to have been a settlement, while the plaintiff and his witnesses say that the defendant's agent said the company was not liable, and would not pay, because he had not told that the land was held on contract, but that, as plaintiff was a poor man, he would make him a present of $200 out of his

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own pocket, and did so. The jury must have believed the latter version. Upon the trial a verdict and judgment for the plaintiff were rendered for the amount of the loss and interest, less the $200, which his counsel asked the jury to deduct from the amount of the loss.

The plaintiff cannot be said to have misrepresented his interest in the premises in saying that he held it on contract, and the policy does not contain anything indicating that he made any claim about it. It does not purport to insure *his* property in terms, but "the house situate," etc. The defendant relies upon the condition in the standard policy which reads as follows:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or *if the interest of the insured in the property be not truly stated herein*, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * *if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple.*"

The day has gone by in Michigan for successfully contending that the mere acceptance of a policy containing a condition like this makes it conclusive against the holder, who accepts it in ignorance of the clause, and whose title does not conform to the strict letter of the condition. Even in the case of *Schroedel* v. *Insurance Co.*, 158 Pa. St. 459, which counsel for the defendant cite, there is a plain intimation that the condition cannot stand against fraud on the part of the company, or mistake; and there are many cases that hold that these conditions may be waived, not alone (as counsel contend) by express agreements to waive, but by conduct which amounts to an estoppel.

There is evidence in this case that the solicitor asked

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the agent whether it was necessary to fill the blanks in the daily report in relation to the condition of the property, and was told that it was, to which the solicitor, who was a German, replied, "Well, I can't make that; I understand not so much English," etc., and was answered, "All right; we will fix it over." The agent testified:

"We insist on a report containing the statement of the nature of the holding. We take it for granted that the land is held by deed, or else the agent has to insert it, and make an indorsement in the front part of the policy. *There is a blank to state what the holding of the property is. We take it for granted* that it is owned by deed in that case."

The unfairness of indulging in such a practice, in case of an ignorant person who is unacquainted with the English language, who takes insurance through a solicitor selected by the defendant, who is also a foreigner, and so poorly equipped for his business as to be unable to make out the papers required of him, and who can himself communicate with the person he solicits only through an interpreter, is manifest. Fair dealing dictates that the agent should see that the information required, and which is necessary to determine whether the policy is valid or not, should appear on the face of the papers. Neither he nor the home office should accept such documents and the consideration, relying upon the right to treat the policy as void if it shall later be discovered that a quibble can be raised over some condition in the policy. And there is nothing unjust in holding that such conduct justifies the inference that the insurer was content to waive the condition, and treat the policy as a contract to insure the interest which the applicant actually had. See *Sibley* v. *Insurance Co.*, 57 Mich. 14; *Castner* v. *Insurance Co.*, 46 Mich. 18; *O'Brien* v. *Insurance Co.*, 52 Mich. 135; *Guest* v. *Insurance Co.*, 66 Mich. 98; *Hoose* v. *Insurance Co.*, 84 Mich. 321. It is contended that, at the least, the defendant was entitled to go to the jury with the question; but we think the undisputed evidence justified the instruction by the learned circuit judge that

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"this was a valid policy at its inception, and that it was not invalidated by the assignment of the land contract, which was ineffective."

The question of settlement was left to the jury under a proper charge.

It is contended that the plaintiff should be restricted to the recovery of one-half the value of the building, inasmuch as the holding was a joint one, and his wife had an equal interest with himself. Some interesting questions are suggested by the claim. It is settled that the husband was, in one sense at least, the owner of more than an unqualified undivided half that would entitle him to that and no more on partition. He has the right to a joint occupancy for life, with a right of survivorship. It is true, however, that he had no greater interest than his wife, and in that sense may be said to have had a half interest. In *Manhattan Ins. Co.* v. *Webster*, 59 Pa. St. 227 (98 Am. Dec. 332), it is held that a partner has an insurable interest to the amount of the entire stock; and in *Trade Ins. Co.* v. *Barracliff*, 45 N. J. Law, 543 (46 Am. Rep. 792), it was determined that "a husband, in possession and enjoyment with his wife of her real and personal property, with an inchoate right of curtesy, has an insurable interest in both, and, where the intention was evinced to insure the whole ownership, may recover the whole loss." This case contains an interesting discussion of the subject, and asserts the doctrine that the amount to be recovered will depend, not on the loss happening to the individual interest of the assured, but on the damage accruing to whatever interests are covered by the policy, so far as the assured represents those interests, whether as his own or by the precedent authority or subsequent ratification of others. See *Waring* v. *Insurance Co.*, 45 N. Y. 606 (6 Am. Rep. 146). We think the doctrine applicable here.

We find no error in the case, and the judgment is affirmed.

The other Justices concurred.

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## McKENZIE v. LAUTENSCHLAGER.

1. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—WITNESSES. Statements made by a wife, not in the presence of defendant, and letters written by her, may be admissible, in an action by her husband for alienating her affections, for the purpose of showing her state of mind towards him.

2. SAME.
Under 3 How. Stat. § 7546, a husband is disqualified to testify, in an action brought by him for the alienation of his wife's affections, to conversations between himself and wife, not occurring in the presence of defendant, unless the wife consents.

Error to Monroe; Kinne, J. Submitted April 14, 1897. Decided May 28, 1897.

Case by Burton McKenzie against John J. Lautenschlager and Mary Lautenschlager for alienating the affections of plaintiff's wife. From a judgment for plaintiff, defendants bring error. Reversed.

*Landon & Lockwood*, for appellants.

*Charles A. Golden* and *Edward R. Gilday*, for appellee.

MOORE, J. Plaintiff recovered a judgment against the defendants for alienating the affections of the wife of the plaintiff, who was a daughter of the defendants. Defendants appeal. It is their claim that a verdict should have been directed in their favor; citing *White* v. *Ross*, 47 Mich. 172. The testimony is conflicting, and we cannot say that there was no testimony, tending to establish plaintiff's case that should have been submitted to the jury.

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Plaintiff was allowed to introduce in evidence statements made by his wife not in the presence of defendants, and letters written by her. The wife was afterwards called as a witness by the defendants, and upon objection by the plaintiff her testimony was excluded. The defendants say this resulted in the plaintiff getting the benefit of admissions and statements made by the wife in his favor, without giving the defendants an opportunity to have the version of the wife, which would have been in their favor, and that this was error; citing *White* v. *Ross*, 47 Mich. 172. Under a later case, we think the testimony was admissible for the purpose of showing the state of mind of the wife towards the husband. *Perry* v. *Lovejoy*, 49 Mich. 529.

Plaintiff was allowed to testify to conversations between himself and his wife which did not occur in the presence of defendants, the record not showing that the wife consented to his testifying. This was contrary to section 7546, 3 How. Stat., as repeatedly construed by this court. *Maynard* v. *Vinton*, 59 Mich. 139; *Hitchcock* v. *Moore*, 70 Mich. 112 (14 Am. St. Rep. 474); *Rice* v. *Rice*, 104 Mich. 371.

The other assignments of error do not call for discussion, as we do not think they were well taken.

Judgment reversed. New trial ordered.

The other Justices concurred.

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## VINCENT *v.* HANSEN.

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1. CHATTEL MORTGAGES—SALE—FRAUD—ESTOPPEL.
   A vendor of goods is not estopped to reclaim them on the ground that they were procured by fraud, by reason of his having had notice, at the time of sale, of a mortgage given by the vendee to secure a pre-existing debt, and covering accessions to the stock.

2. SAME—JUDGMENT—RES JUDICATA.
   A judgment in replevin in favor of the vendor of goods, based upon the fraud of the purchaser, is not *res judicata* as to one to whom the goods were mortgaged before the claim of fraud was made.

Error to Manistee; McMahon, J. Submitted April 14, 1897. Decided May 28, 1897.

Replevin by William Vincent against John Hansen. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

*F. E. Withey*, for appellant.

*Peter Doran* (*McAlvay & Grant*, of counsel), for appellee.

HOOKER, J. The Reeder Bros. Shoe Company brought replevin against Carpentier for goods which the former sold to the latter in May, 1895, claiming that they were procured through fraud. The action was commenced on December 4, 1895, on which day the Reeder Bros. Shoe Company received the goods from the sheriff, and gave the statutory bond. On the same day or the next, the Reeder Bros. Shoe Company sold these goods to Hansen, the defendant, from whom they were replevied by the plaintiff, December 5, 1895. The plaintiff's claim is based on two chattel mortgages, one of which was given him

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by Carpentier on November 25, 1895, for $500, for rent then and thereafter to become due, while the other was assigned to him by the mortgagee after the replevin suit by the Reeder Bros. Shoe Company was begun. This mortgage was given in 1892, and covered Carpentier's stock of goods, and such goods as might thereafter be added thereto, and was given to secure a pre-existing indebtedness of $1,400. The Reeder Bros. Shoe Company knew of the existence of this mortgage. The first replevin case was tried in September, 1896, and a verdict was rendered and judgment duly entered for the plaintiff. This action was brought on for trial subsequently, but at the same term, and the judgment in the other suit was interposed as a bar, and the court thereupon directed a verdict for the defendant.

Error is assigned upon several rulings, but they are all covered by the question mentioned. As no question is raised regarding it, we shall discuss the case upon the assumption that the judgment rendered two days before the trial was offered in evidence under proper pleadings. The judge held that these mortgagees were privies to the mortgagor; that their rights would be no greater or other than his; that, if he got no title to these goods, he could convey no title to them; and that, when the Reeder Bros. Shoe Company's title was adjudicated against him, it was adjudicated against them. The learned circuit judge expressed doubt upon the question, and recognized the impropriety of enforcing this doctrine against a purchaser for value before the adjudication, and without notice. The claim is made that the Reeder Bros. Shoe Company should be estopped from asserting title as to the bank mortgage, of the existence of which it was advised, as the bank might be supposed to rely upon accessions, to make good depletions by sales; but we think there is no force in this. The mortgage, when given, was for a past-due indebtedness, and was not good against a claim for fraud as to the goods then on hand; and we think it would be no better as to accessions. *Schloss* v. *Feltus*,

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103 Mich. 525. The other mortgage may have been on a different footing, as it was given to secure rent to accrue later, and, to some extent, may have been based upon a valuable consideration, within the meaning of the term as applied to such cases. But however that may be, and although it should be held that by neither mortgage did Mr. Vincent get a better title than the mortgagor had, we are of the opinion that he should not be held concluded by the judgment in the case to which he was not a party. Both mortgages were given before the claim of fraud was made, and the mortgagees had the right to try the question of the mortgagor's title. To hold otherwise would be to make it possible for collusion between the debtor and creditor to defeat a mortgage, without the possibility of his defending his claim. It is suggested that these were cross replevins within the statute, but we think not. Vincent's claim is one personal to himself.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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BLY *v.* BRADY.

1. WRITTEN INSTRUMENTS — PLEADING AND PROOF — DEFENSES — FRAUD.

Plaintiff brought *assumpsit* in justice's court upon a written lease, but did not file with the justice the instrument sued upon. Defendant pleaded the general issue, with notice of set-off, recoupment, and failure of consideration, and, upon his appeal from an adverse judgment, added a notice that he would insist upon the further defense that his signature to the lease, if it was in fact signed by him, was obtained without consideration. Plaintiff, upon the trial, offered proof of the execution of the lease, and introduced it in evidence. *Held*, that evidence that defendant was induced to sign by fraudulent representations as to the character of the paper was competent under the pleadings.

2. SAME—PRIMA FACIE CASE—BURDEN OF PROOF.

In an action upon a written lease, plaintiff, by proving the execution of the instrument and offering it in evidence, makes out a *prima facie* case, and the burden is upon defendant, who seeks to avoid its effect under a claim that his signature was fraudulently obtained, to establish the fraud.

Error to St. Joseph; Yaple, J. Submitted April 15, 1897. Decided May 28, 1897.

*Assumpsit* by Kinyon Bly and Alexander Taylor against J. W. Brady, A. L. Guthrie, and Isaac G. Bliss, for rent. From a judgment for defendant Bliss, plaintiffs bring error. Reversed.

*L. B. Des Voignes* and *Howell & Carr*, for appellants.

*H. O. Bliss* and *B. E. Andrews*, for appellee Bliss.

MOORE, J. This suit was commenced in justice's court. "The plaintiffs declared verbally in *assumpsit* on all the common counts on a lease dated the 28th day of March, 1889, signed by Kinyon Bly, one of the above-

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named plaintiffs, and by E. A. Palmer and C. A. Sherrod, which said E. A. Palmer and C. A. Sherrod have duly assigned their interest to Alexander Taylor, one of the above-named plaintiffs, which assignment is in writing and filed herein. Said lease is also signed by the said defendants." The lease was not filed with the justice. After several continuances without pleading, a plea was interposed: "Now comes the defense, and declares the general issue, and notice of set-off, recoupment, and failure of consideration." The case was tried, and a judgment rendered in favor of the plaintiffs. The defendants appealed the case to the circuit court, where a more formal plea was entered on the part of the defendant Isaac G. Bliss. He pleaded the general issue, and gave notice "that, in addition to any other special defenses of which notice has been given by him, he will give *in* evidence, and insist in his defense, that his signature *to* the lease, contract, or other instrument upon which plaintiffs seek to recover against him in this action, if the same was signed by him at all (which fact this defendant denies), was obtained without any consideration whatever." The trial resulted in a verdict for the defendant Isaac G. Bliss. The plaintiffs appeal.

Several errors are assigned. We think but two of them call for discussion. It was the claim of the plaintiffs that all the defendants signed the lease which was introduced in evidence,—Brady and Guthrie signing it the day it was written, and Bliss a few days thereafter at his home,—and evidence was given tending to establish their contention. It is the claim of Bliss that, after the lease was executed by the real parties thereto, and some time after Brady and Guthrie had taken possession of the store, Bly came to Bliss, when the latter was at work in his field, and asked him some questions as to the responsibility of Brady and Guthrie, and asked Bliss to sign a recommendation of Brady and Guthrie, and produced a paper which Bly claimed was a simple recommendation of Brady and Guthrie, and assured Bliss that he could in no way become



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liable by signing the paper, and would never hear of it again; that Bliss was about 70 years of age, and unable to read without glasses, and had no glasses with him, of which fact he advised Bly; that Bliss, acting upon and believing what Bly said was true as to the contents of the paper, signed it; that he would not have done so if he had been told he was signing a lease; and that nothing was said to him about a lease. He further testified that the first time he saw the lease, to know what it was, was at the trial in justice's court, and that he never knew his name was on the lease until after he was sued. It is the claim of the plaintiffs that this testimony was incompetent under the pleadings, and they cite *Child* v. *Manufacturing Co.*, 72 Mich. 623; *Miller* v. *Finley*, 26 Mich. 249 (12 Am. Rep. 306); *Briesenmeister* v. *Supreme Lodge Knights of Pythias*, 81 Mich. 525; *Union Central Life Ins. Co.* v. *Howell*, 101 Mich. 332.

The cases do not sustain the contention of plaintiffs. It will be remembered that plaintiffs did not file the lease with the justice of the peace at the time the declaration was made; and the record does not disclose that the defendant, or any one acting for him, saw the lease after the suit was commenced until the lease was produced upon the trial, but does show that Mr. Bly refused to let the defendant Bliss see it. Under the pleadings the lease could not be introduced in evidence without first proving it. *Colbath* v. *Jones*, 28 Mich. 280; *Bauer* v. *Wasson*, 60 Mich. 194; *Newton* v. *Principaal*, 82 Mich. 271. This was recognized by plaintiffs on the trial, and it was not offered by them until they had offered proof of its execution. We think the following cases bear upon the question: *Anderson* v. *Walter*, 34 Mich. 113; *Berringer* v. *Lake Superior Iron Co.*, 41 Mich. 305; *Soper* v. *Peck*, 51 Mich. 563; *Child* v. *Manufacturing Co.*, 72 Mich. 623,—and that the court did not err in the admission of the testimony.

The plaintiffs asked the court to give the following request:

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"When the defendant attempts to avoid the signing of this lease in question by claiming that he signed another paper, thinking it to be merely a recommend, and that the signing of such other paper was induced by the trick or misrepresentation of the plaintiffs, then the burden of proof shifts, and it devolves upon the defendant to show by a preponderance of testimony that he signed such other paper, claimed by him to be a recommend merely."

The request was refused, and the court charged the jury as follows:

"To entitle the plaintiffs to recover, they are required to prove their case by a fair preponderance of the evidence. The execution of the lease in question on the part of Brady and Guthrie is not disputed; but, before the plaintiffs can recover in this action, they must also prove, by a fair preponderance of the evidence, the execution of the lease on the part of the defendant Bliss, and the assignment by Palmer and Sherrod of their interest in the lease and rent to Taylor. If the plaintiffs have proved, by a fair preponderance of the evidence, that the consideration, in whole or in part, for the execution of the lease, on the part of Bly, Sherrod, and Palmer, was the promise or agreement on the part of Bliss to execute the same on his part, and Bliss did execute it by signing the same, in pursuance of and to carry out his agreement, then Bliss would be liable on the lease, although he may not have signed it until after Brady and Guthrie executed it, and had commenced occupying the store; and if you further find that Palmer and Sherrod transferred their interest in the lease and the rent, before the commencement of this suit, to Taylor, then the plaintiffs are entitled to recover in this action for the rent of the store at the price stipulated in the lease, and the burden of proof of any payments on the rent, except such as are admitted by the plaintiffs, would be upon the defendants."

Plaintiffs claim this was error.

When the plaintiffs proved the execution of the lease, and offered it in evidence, they established a *prima facie* case, and, if no other proof was offered, were entitled to a verdict. The burden of proof is shifted by presumptions of law, presumptions of fact of the stronger kind, and evidence strong enough to establish a *prima facie* case.

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2 Am. & Eng. Enc. Law, 656; *People* v. *Swineford*, 77 Mich. 582. To overcome the *prima facie* case made by the plaintiffs, the defense offered is that the signature to the lease was procured by fraud, and that no liability was incurred by the signing of it. We understand the rule to be, "He who alleges fraud must prove it." 2 Am. & Eng. Enc. Law, 656; *Miller* v. *Finley*, 26 Mich. 249 (12 Am. Rep. 306); *Robert* v. *Morrin*, 27 Mich. 306; *Darling* v. *Hurst*, 39 Mich. 765; *Brown* v. *Dean*, 52 Mich. 267; *Attorney General* v. *Ruggles*, 59 Mich. 123; *McArthur* v. *Oliver*, 60 Mich. 605; *Allison* v. *Ward*, 63 Mich. 128; *Peaslee* v. *Collier*, 83 Mich. 549; *Blanchard* v. *Moors*, 85 Mich. 380; *Zucker* v. *Karpeles*, 88 Mich. 413. In *Sloan* v. *Holcomb*, 29 Mich. 153, where, in defense to a foreclosure suit, it was averred that the mortgage was procured by false representations, it was held that the burden of proving such representations was on the defendants. See *Bostwick* v. *Benjamin*, 63 Mich. 289. The charge of the court was error. The plaintiffs were entitled to have an instruction to the effect that, as the defense was that the signature to the lease was obtained by fraud, the burden was upon the defendant to establish his defense.

The other assignments of error do not require discussion.

Judgment is reversed, and a new trial granted.

GRANT, MONTGOMERY, and HOOKER, JJ., concurred. LONG, C. J., did not sit.

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## SPANISH RIVER LUMBER CO. *v.* CITY OF BAY CITY.

1. TAXES—FOREST PRODUCTS—HOW ASSESSED.

Section 24 of Act No. 206, Pub. Acts 1893, which provides that assessments of property to one other than the owner shall show in what capacity it is assessed to him, does not limit the authority conferred upon the assessing officer by section 14, subd. 8, to assess forest products to the person "having control" of the premises where the same are situated, so as to require him to ascertain whether the property is held by such person as agent, guardian, or otherwise.

2. SAME.

That one who has control of a dock for the purpose of placing lumber thereon has sold part of the lumber placed upon it to another person, who is authorized to remove it, does not take from the former the control of that part of the dock containing the lumber sold, so as to prevent the assessment of such lumber against the seller, under Act No. 206, Pub. Acts 1893, § 14, subd. 8, providing that all forest products shall be assessed to the person having control of the dock where they are situated.

Error to Bay; Maxwell, J. Submitted April 15, 1897. Decided May 28, 1897.

*Assumpsit* by the Spanish River Lumber Company against the city of Bay City to recover a tax paid under protest. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*McDonell & Hall*, for appellant.

*U. R. Loranger*, for appellee.

HOOKER, J. The plaintiff, a Canadian corporation, was engaged in the business of bringing logs from Canada, to be cut in the mills at Bay City, for the purpose of sale. It owned no premises or docks, and in 1893 it made a contract with Folsom & Arnold, owners

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of a sawmill and docks at Bay City, to saw, and pile upon their docks, for it, 10,000,000 feet of logs. This was done, and the lumber produced therefrom was piled on the docks of Folsom & Arnold during 1893. In the spring of 1894 all of said lumber remaining upon said dock was assessed as follows: "Personal lumber on Folsom & Arnold's dock, $24,150; E. B. Foss & Co., same, $14,450." The assessor testified that he made such assessment from a memorandum furnished by Mr. Carrington, plaintiff's president, showing that, of said lumber, the plaintiff owned 2,106,900 feet of white pine and 1,880,810 feet of Norway, and that Foss & Co. owned 2,066,067 feet of white pine. The board of review struck out the item of $14,450, to Foss & Co., and added it to the plaintiff's assessment, by changing the figures from $24,150 to $38,600. The assessor testified that they were in doubt as to the ownership; that Carrington claimed that Foss owned it, and Foss claimed that it had not been paid for, and did not belong to Foss & Co.; and the board, after hearing the statement and arguments of the parties and counsel, took the action stated. The tax was paid under protest, and this action was brought to recover the amount.

The court seems to have been of the opinion that the assessment was properly made to the person who had control of the dock, under subdivision 8, § 14, Act No. 206, Pub. Acts 1893, which provides that—

"Personal property of non-residents of the State, and all forest products owned by residents or non-residents or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage, or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that, where such property is in transit to some place within the State, it shall be assessed in such place."

Counsel for the plaintiff offered to show that the property represented by the item of $14,450 was the property

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of E. B. Foss & Co., upon the claim that, if it was, the assessment was void, because the plaintiff was not described as agent in the assessment, under section 24 of said Act No. 206, which provides that "property assessed to one other than the owner shall be assessed separate from his property, and shall show in what capacity it is assessed to him, whether as agent, guardian, or otherwise." This testimony was excluded. The court allowed the plaintiff to offer testimony upon the question of the control of the dock.

The record indicates that a question of title was raised in regard to this lumber. The board found it difficult to decide the question of ownership, and assessed the property to the one it determined to be in control of the dock. This the law permitted, if it did not require. We are of the opinion that the assessment was not void, although Foss & Co. were the owners. It was not necessary that the assessment should be made against the plaintiff as agent, because the board did not assume to assess the lumber as the property of persons other than the plaintiff, but did assess it under subdivision 8, § 14, expressly permitting its assessment to the custodian as owner.

It is contended that this lumber was not assessed to the one having control of the dock, because it had been sold to Foss & Co., who were authorized to remove it, and that from the time of such sale the control of that portion of the dock was in them. The plaintiff hired Folsom & Arnold to cut a large amount of lumber, and pile it upon Folsom & Arnold's dock for its use. At the plaintiff's convenience, lumber was removed and sold, and presumably other lumber piled in its place. There would seem to be more reason in saying Folsom & Arnold, who owned the dock, controlled it, than that Foss & Co. did; but it is not unreasonable to conclude that the dock was not under the actual control of either, but of the plaintiff, to whose purposes it was devoted. If, as would seem reasonable, the dock is to be considered as appurtenant to the sawmill, such a conclusion would be

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consistent with the legislative view of this subject, shown by section 14, subd. 1, which provides that—

"All goods and chattels situate in some township other than where the owner resides shall be assessed in the township where situate, and not elsewhere, if the owner or person having control thereof hires or occupies a store, mill, dock, yard, piling ground, place for sale of property, shop, office, mine, farm, place of storage, manufactory, or warehouse therein, for use in connection with such goods and chattels: *Provided*, that the procuring any such property to be manufactured upon contract shall be deemed the hiring a mill or manufactory within the meaning of this section."

Carrington testified that the plaintiff had the use of the dock, as a place of storage. In our judgment, the undisputed facts show that the board lawfully assessed this lumber to the person in control of the dock, regardless of the question of title, which was in dispute. Plaintiff's remedy, if it has any, is against Foss & Co.

The judgment is affirmed.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. LONG, C. J., did not sit.

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## WARD v. NESTELL.

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1. TAX TITLES—HUSBAND AND WIFE.
A husband, while in joint occupancy of land with his wife, cannot acquire a tax title valid as against her.

2. TRIAL—EVIDENCE—CONTENTIONS OF COUNSEL.
In an action of ejectment by a wife's administrator against the heirs of her deceased husband, defendants' attorney offered in evidence a tax deed acquired by the husband in the lifetime of the wife, stating that he proposed to follow it up by proof of adverse possession. The admissibility of the deed was questioned, and the court inquired if defendants proposed to build up title under the deed, and also asked if there was any claim that the statutory period began to run from the death of the wife. Defendants' counsel refused to concede that they relied wholly upon the deed, or to base their claim solely on adverse possession subsequent to the death of the wife, but stated that they would "build title of possession up under the deed from the time it was given." The court thereupon rejected the evidence, and directed a verdict for the plaintiff. *Held*, that defendants should have been allowed to introduce their proofs relating to adverse possession. GRANT, J., dissenting.

3. ADVERSE POSSESSION—COLOR OF TITLE.
Adverse possession of land need not, under 3 How. Stat. § 8698, be based upon color of title, nor need the possession have been hostile in the first instance, but it is sufficient if it continues for the requisite time, although the original entry was by consent of the owner and without shadow of title.

Error to Clinton; Daboll, J. Submitted April 15, 1897. Decided May 28, 1897.

Ejectment by Alfred B. Ward, administrator of the estate of Clarissa A. Nestell, deceased, against Jane Nestell and others. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Reversed.

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Clarissa A. Nestell purchased the land in controversy November 1, 1866, and her deed was placed upon record the same day. She also had a tax deed for the taxes of 1865, dated June 14, 1871, and recorded June 24, 1871. The land consisted of 20 acres, and was used and occupied by her husband as a part of the farm, he owning the title to the rest of the land. Mrs. Nestell died in 1880. Mr. Nestell and his children continued in the occupancy of this farm after her death, the same as before, until his death, in March, 1896. The barns were situated upon this 20 acres, the dwelling house being situated across the highway on his land. They occupied the farm together, he cultivating the farm and receiving the profits therefrom. No administrator of her estate was appointed until after his death, when plaintiff was appointed and instituted this suit. Mr. Nestell left a will devising a life estate to the defendant Jane, and the remainder in fee simple to the defendant Fred. Plaintiff rested his case upon the recorded evidence of title and proof of occupancy, as above stated. Denial of possession was conceded. Defendants offered a tax deed to Hiram Nestell for the taxes of 1866, dated June 14, 1871, and recorded July 16, 1885. The court excluded the deed, holding that the husband, while in joint occupancy of land with his wife, cannot acquire a tax title valid as against her, and directed a verdict for the plaintiff.

*Spaulding & Norton* and *Fedewa & Walbridge*, for appellants.

*Lyon & Dooling*, for appellee.

GRANT, J. (*dissenting; after stating the facts*). The ruling of the court was correct. The law does not permit a husband to acquire a tax title adverse to the title of his wife. This tax title inured to her benefit just as conclusively as though he had taken the title in her name. It could not be made the basis of an adverse possession during her life. *Laton* v. *Balcom*, 64 N. H. 92; *Willard* v.

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*Ames*, 130 Ind. 351; *Burns* v. *Byrne*, 45 Iowa, 285. "It simply inures to the protection, not to the destruction, of the regular title." *Horton* v. *Ingersoll*, 13 Mich. 413; *Richards* v. *Richards*, 75 Mich. 408. The tax title inuring to her benefit, it follows that it was merged in her original title, and cannot be made the basis of an adverse holding. The defendants did not base their claim of title by adverse possession upon any other color than that of this deed. This is apparent from the record. Before the final ruling, the following colloquy took place:

"*The Court:* I am inclined to hold and instruct the jury, and I do, that under the circumstances of this case, as they appear now, the husband is not permitted, by purchasing a tax title, to build up a title adverse to that of his wife, they living together upon the premises as husband and wife, and therefore the evidence offered is incompetent; and under the statement of counsel made at the opening, that being the point they defend upon, I think there is no use of going any further in the case.

"*Mr. Lyon:* I understand that under the ruling they have no other evidence to offer.

"*Mr. Spaulding:* I want to state that we do not quite concede the statement, so far as the court puts it, that we were relying wholly upon the deed. Our defense, however, is the title. Our defense, as it stands now, is that we have this deed I have offered for the purpose of showing title, and also we shall follow it up, if necessary, by the other fact of possession.

"*The Court:* Well, you mean follow it up by building a title up under that deed?

"*Mr. Spaulding: Build title of possession up, yes, sir, under that deed, from the time it was given.*

"*The Court:* I don't think it is permissible."

It thus conclusively appears that the defendants did not base their adverse possession upon the principle established in *Pattison* v. *Dryer*, 98 Mich. 564, and did not bring this case within that. We are not, therefore, called upon to discuss the question of title by adverse possession where a husband remains in the possession of his wife's land after her decease. The deed was properly excluded, and the defendants offered no other evidence of title.

The judgment should be affirmed.

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MOORE, J. I agree with Mr. Justice GRANT that the husband, while in joint occupancy of land with his wife, cannot acquire a tax title valid as against her, but I do not think that is the only question involved in the case. The wife died in December, 1880. This suit was commenced in July, 1896. So that enough time intervened after her death to acquire title by adverse possession. To understand the case, I think it necessary to quote a little more fully from the record. Mr. Green had been sworn as a witness, and testified that he had lived near the land in controversy nearly 50 years; that it was generally understood in the neighborhood to be Mr. Nestell's; that Mr. Grummond wanted to sell the land to witness, and, after it was sold, Mr. Nestell told the witness that he had bought it. At this point a tax deed was offered in evidence, when the following occurred:

"The counsel for the plaintiff objected to the admission in evidence of said deed as incompetent, for the reason that under the law a husband could not acquire at that time a tax title upon property the paper title to which stood in his wife; that the procedure is forbidden by the rules of public policy.

"*The Court:* Gentlemen, I am inclined to take the position in this case, as to the question of acquiring title, a man cannot acquire title against his wife by adverse possession.

"*Mr. Spaulding:* In connection with that, if the deed should be received, we propose to follow it up by adverse possession beyond the period.

"*The Court:* Now, let us see if we are agreed as to some things that already appear. I understand it is in evidence, and is not sought to be contradicted, that Mr. and Mrs. Nestell lived together as husband and wife at the time of the taking of the deed, the original title, to her, at the time of the making of the tax title to her. That, I think, was the same day as the tax title you now offer. They continued to live together as husband and wife, these premises being worked in connection with the farm in some way, up to the time of the death of Mrs. Nestell, which was in December, 1880, Mr. Nestell being then alive. When was this suit commenced?

"*Mr. Lyon:* In July last, the same month that the administrator of her estate was appointed.

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"*The Court:* So there is no claim made that, beginning with 1880, there could be any adverse possession?

"*Mr. Spaulding:* There is time enough since her death, but we claim he was in possession adverse to her title even before her death.

"*The Court:* I am inclined to hold and instruct the jury, and I do, that under the circumstances of this case, as they appear now, the husband is not permitted, by purchasing a tax title, to build up a title adverse to that of his wife, they living together upon the premises as husband and wife, and therefore the evidence offered is incompetent; and under the statement of counsel made at the opening, that being the point they defend upon, I think there is no use of going any further in the case.

"*Mr. Lyon:* I understand that under the ruling they have no other evidence to offer.

"*Mr. Spaulding:* I want to state that we do not quite concede the statement, so far as the court puts it, that we were relying wholly upon the deed. Our defense, however, is the title. Our defense, as it stands now, is that we have this deed I have offered for the purpose of showing title, and also we shall follow it up, if necessary, by the other fact of possession.

"*The Court:* Well, you mean follow it up by building a title up under that deed?

"*Mr. Spaulding:* Build title of possession up, yes, sir, under that deed, from the time it was given.

"*The Court:* I don't think it is permissible.

"And thereupon the said circuit judge rejected the said evidence as inadmissible, and directed the jury to return a verdict for plaintiff."

When the law required the adverse possession to be based upon a color of title, a ruling like that of the circuit judge would be proper. Our statute does not require that the adverse possession shall be based upon color of title. 3 How. Stat. § 8698. And for a great many years the decisions of this court have been to the effect that it is not necessary to adverse possession that it should be based upon paper title or a color of title. It is only required that it shall continue for the requisite time after right of action accrues against the possessor. It may become perfected though in its origin the possessor had no shadow of title. *Campau* v. *Dubois*, 39 Mich. 274; *Campau* v. *Lafferty*,

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50 Mich. 118; *Cook* v. *Clinton*, 64 Mich. 309 (8 Am. St. Rep. 816); *Bird* v. *Stark*, 66 Mich. 654; *Sanscrainte* v. *Torongo*, 87 Mich. 69; *Shearer* v. *Middleton*, 88 Mich. 621. Nor is it required that the act of taking possession in the first instance shall be hostile. *Bower* v. *Earl*, 18 Mich. 377; *Michigan Land & Iron Co.* v. *Thoney*, 89 Mich. 226.

While it may be entirely true that a tax title acquired by the husband while the paper title to the property was in the wife inured to her benefit, it does not follow that the husband, and those claiming under him, could not acquire title by adverse possession, even though the husband had taken a tax title upon the property. While the record is not as clear as could be desired, I cannot reach any other conclusion from reading it than that it is made to appear that defendants not only relied upon the tax title, but also upon title gained by adverse possession after the death of the wife. I think they should have been allowed to introduce their proofs relating to the question of adverse possession, and that the judgment should be reversed.

LONG, C. J., MONTGOMERY and HOOKER, JJ., concurred with MOORE, J.

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## MARBLE v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

RAILROAD COMPANIES—TITLE TO RIGHT OF WAY.
Case ruled by *Minneapolis, etc., R. Co.* v. *Marble*, 112 Mich. 4.

Error to Delta; Stone, J. Submitted April 16, 1897. Decided May 28, 1897.

Ejectment by Webster L. Marble and others against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Affirmed.

*E. C. Chapin*, for appellant.

*Ball & Ball*, for appellees.

PER CURIAM. The question raised by this record became unimportant, as the merits of the case were heard and determined in the case of *Minneapolis, etc., R. Co.* v. *Marble*, 112 Mich. 4.

The judgment is affirmed.

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## HARRIS *v.* CABLE.

1. EVIDENCE—GIFT—QUESTION FOR JURY.
   An executor is not entitled to a directed verdict in an action for the conversion of a promissory note alleged to have belonged to the estate, where defendant's claim that the note was a gift to her from the testator in his lifetime is supported by evidence that he had deposited to her credit amounts equal to the several payments of interest upon the note on the same days that interest was paid to him, that he had inquired of her in the presence of third parties as to what she wished done with the moneys from such note, that the note bore the indorsement of the testator, and that the defendant produced it, after the testator's death, from among her own private papers.

2. SAME—ADMISSIONS—INFERENCES.
   The testimony of an alleged donee of a note from a decedent, that, at the time she produced the note in response to the request of the executor, she stated that it was hers by gift from the testator, is admissible to rebut any inference of an admission against her ownership, arising from the production of the note in response to such request.

3. TRIAL — WITNESSES — VOLUNTEERED STATEMENTS — HARMLESS ERROR.
   A volunteered statement of defendant, sued for the conversion of a promissory note alleged to have belonged to plaintiff's decedent, that the plaintiff, as executor, admitted, when the note was produced, that it belonged to defendant, does not require the reversal of a judgment in her favor, where the statement was promptly stricken out with the consent of her counsel, and the jury were cautioned against giving it consideration.

Error to Saginaw; Wilber, J. Submitted April 6, 1897. Decided May 28, 1897.

Trover by Edward W. Harris, executor of the last will and testament of Jacob F. Batchelor, deceased, against Martha L. Cable, for the conversion of a promissory note.

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From a judgment for defendant, plaintiff brings error. Affirmed.

*Humphrey & Grant*, for appellant.

*Hanchett & Hanchett*, for appellee.

HOOKER, J. A statement of the main facts in this case will be found in 104 Mich. 365, a former judgment being there reviewed and reversed, and a charge directing a verdict for the defendant held erroneous. Upon the present record the main question arises upon a request to direct a verdict for the plaintiff, which the court refused.

There was evidence tending to show that Miss Cable was the housekeeper of the deceased, having come to reside in his family in 1853 or 1854, when she was a young girl, and remained with him until he died. A few days after his death, at a reading of the will, a son of the deceased (who is prosecuting this case) spoke of the note in controversy, and asked the defendant where it was, or what had become of it. The witnesses disagree as to her reply, some saying that she said it was "with the other papers of the testator," and others that "that McCausland note is all right." The evidence shows that this was the last of a series of four notes, all but the first being successive renewals of a note given by McCausland & Co. to the testator for $5,000 loaned them by him. These notes were indorsed in blank by Avery, to whom, or bearer, the notes were made payable as accommodation indorser. The third and fourth notes bore the indorsement of the testator, J. F. Batchelor, in blank. It was shown that interest on the last two notes was promptly paid to Batchelor, and that upon the same days amounts equaling the respective payments were deposited by him to the credit of Miss Cable, the defendant, in a bank with which she had an account. There was testimony by one Wilke—who was a legatee under the will—that in the first days of June, 1891, while at work for the testator, he



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heard a talk between the testator and the defendant. In answer to the question, "Did you hear any conversation between Mr. Batchelor and Miss Cable about the McCausland note?" he answered: "Yes. I don't know anything about the note, but I was in there. He was coming in, and asked her what she wanted to do with the money from Plumb & McCausland,—whether she wanted it turned over to the bank, or whether she wanted to leave it; and she answered back, 'Which would get the most interest?'" Another witness testified that Plumb & McCausland were the predecessors in business of McCausland & Co. The defendant testified that she did not take this note from the papers of the testator after his death, and that subsequently, when she produced it, she obtained it from among her private papers, and that the first time that she saw the note after the testator's death it was among her private papers relating to her father's estate.

We are all of the opinion that this evidence justified the submission to the jury of the question whether or not the testator, who was the original owner of the claim represented by these successive notes, gave it to the defendant. From the nature of the case, no positive evidence of the transaction and manual delivery was possible,—one party being dead and the other disqualified; but the testimony of Wilke, and the conduct of the testator, as to the collection of interest, the coincidence in time and amount of the collection and deposit, are ample to give rise to an inference of ownership by the defendant, while the situation and relation of the parties, and the exceptional opportunities for surreptitiously obtaining possession of the note, made it a proper case to leave to the scrutiny of a jury. Much space, in the brief of counsel for the plaintiff, is devoted to a discussion of the presumption arising from possession of the paper. We think undue importance is attached to this question. There was no dispute over the original ownership of this claim, and the jury were instructed that the plaintiff must recover, unless they were satisfied that defendant became

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the owner by gift. If she did so, and the testator afterwards collected the interest, and deposited it to her account, it does not follow that he had the custody of the note, or necessarily raise a presumption of ownership if he had. The court fairly submitted the crucial question.

Miss Cable was allowed to testify that, when she produced the note at the plaintiff's request, she accompanied it with the statement that it was hers by gift from the testator. This was not admissible as substantive evidence of the gift, but it was admissible in its tendency to rebut the inference of an admission against her ownership, sought to be drawn from the production of the note under the circumstances shown. It was not proper to show that the plaintiff there said that the note was hers, but this was volunteered by the witness, and it was stricken out at once, by consent of her counsel. The learned circuit judge was careful to caution the jury against this testimony, and we think it does not warrant a reversal of the judgment.

We think that plaintiff's counsel underrate the significance of testator's indorsement of these notes, in connection with the other testimony. If, as they claim, we must say that it was unnecessary to pass title, it may have been an intentional indorsement, by way of guaranty that the notes would be paid at maturity. It was not inconsistent with defendant's claim, and there is opportunity for the argument that he would not have been likely to indorse in blank two notes that he intended to keep, and not two other notes, which we know that he did not part with.

The number of assignments of error is large, and we must content ourselves with the discussion of the more important ones. We find no error in the record, and the judgment is affirmed.

The other Justices concurred.

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## KROLL *v.* DIAMOND MATCH CO.

STATUTE OF FRAUDS—CONTRACTS FOR SALE OF LAND—OFFER AND ACCEPTANCE—CONSIDERATION.

The tender of a deed of lands, pursuant to the written offer of the person named as grantee to pay a specified price therefor, does not, even in the absence of a preceding oral acceptance, complete a contract for the sale of land, complying with the requirement of the statute of frauds that such contracts, to be binding, shall be in writing, signed by the party by whom the sale is to be made.

Error to Houghton; Hubbell, J. Submitted April 16, 1897. Decided May 28, 1897.

*Assumpsit* by William Kroll against the Diamond Match Company to recover the purchase price of land sold. From a judgment for defendant, plaintiff brings error. Affirmed.

*Hill & Rood*, for appellant.

*A. R. Gray*, for appellee.

HOOKER, J. The findings of fact in this cause state that the defendant's manager negotiated with the plaintiff for the purchase by the defendant of plaintiff's interest in certain lands, and executed and delivered to the plaintiff a writing, reading as follows:

"Feby. 28, '94.

"Draft for $2,000. We will send Wm. Kroll, of Kenton, Mich., on rec't from him of a Q. C. deed based on State T. D. of N. E. ¼ 1, and N. E. ¼ 23-47-40.

"D. M. Co., by J. H. COMSTOCK, Mgr."

After giving the said writing to plaintiff, it was agreed between him and said Comstock that the deed contemplated by said proposal should be made to him, said Comstock, personally, instead of to the defendant. The plain-

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tiff tendered a deed, which defendant refused to accept, and withdrew its proposal. Thereupon plaintiff brought this action for the price, and was defeated, whereupon he brought the case to this court.

The defense relied on is the statute of frauds. Counsel for the plaintiff claim that the execution of the deed amounted to an acceptance of the written offer of the defendant. They seem to freely admit that, had this offer been accepted orally, it would not have been a binding contract, and that the subsequent tender of the deed would not have made it so, but emphasize the alleged fact that there was no acceptance of the offer, except as the tender of a deed was such acceptance, and say that, being in writing, it had the effect of completing a written contract, which complies with the requirements of the statute, resting upon the offer and the deed. The effect of this argument is to make the validity of the contract depend upon the question whether or not there was an acceptance previous to the making of a deed, thus putting one who had not so accepted upon a better footing than one who made his deed in accordance with his pre-existing promise to do so. This, to say the least, is a distinction that is very technical, and does not appeal strongly to our sense of justice.

No authorities are cited which clearly sustain plaintiff's contention, while several Michigan cases are opposed to it. In *Scott* v. *Bush*, 26 Mich. 418 (12 Am. Rep. 311), a consideration paid for land bargained orally was recovered back, although the owner was willing and offered to convey. The court held that the oral promise to convey was not binding when made, and hence the payment was without consideration. They were regarded as preliminary negotiations, which conferred no rights, and could not thereafter be made binding by any attempt of a single party to force a contract upon the other. It was added that, "if there was no contract already in existence, the subsequent assent of both was as necessary as if they had never negotiated. A party who has never

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become bound cannot be held by any but his own agreement. * * * And we cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else."

The case of *Liddle* v. *Needham*, 39 Mich. 147 (33 Am. Rep. 359), is in point. This is a case where Liddle agreed that, if Needham would deed to Liddle's son, he would pay. Needham deeded, but Liddle refused to pay. The court said that "the agreement, when made, was without force. * * * As Needham's promise to deed was not binding at all, Liddle's promise, made entirely on the strength of it, was not binding for lack of consideration." Although the son accepted the deed, the suit against the father failed.

Had the plaintiff tendered the deed, and defendant accepted, and gone into possession under it, the action might possibly be sustained, even had his promise been oral. *Toan* v. *Pline*, 60 Mich. 385; *Waldron* v. *Laird*, 65 Mich. 239; *Kelsey* v. *McDonald*, 76 Mich. 188.

*Ducett* v. *Wolf*, 81 Mich. 311, would be upon all fours with this case but for the fact that in that case there was an oral agreement to convey,—a point upon which counsel do not agree as to this case. The court said:

"There was no consideration for this promise [*i. e.*, to take the land], except the promise of the plaintiff to convey the land to them; but, as this promise of the plaintiff was not binding upon her until the deed was actually *delivered and accepted*, it could furnish no consideration for the defendants' promise to pay the money."

The authorities seem conclusive. The judgment of the circuit court is affirmed.

The other Justices concurred.

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## YOUNGS *v.* ADAMS.

1. SLANDER—WORDS ACTIONABLE PER SE.
   To say to another, "You are a liar and a thief," is, if left unexplained, slanderous, and actionable *per se*.

2. SAME—JUSTIFICATION—EVIDENCE.
   The defense of justification is not established, in an action for slander in calling one a thief, by proof of cheating, trickery, and fraud, not amounting to actual theft.

Error to Marquette; Stone, J. Submitted April 16, 1897. Decided May 28, 1897.

Case by Clark W. Youngs against Sidney Adams for slander. From a judgment for plaintiff, defendant brings error. Affirmed.

*Ball & Ball*, for appellant.

*Hill & Rood*, for appellee.

HOOKER, J. The defendant appeals from a verdict and judgment against him in a slander case. The slanderous words charged were: "You are a liar and a thief, and I have the papers to prove it." The court instructed the jury that these words, taken in their ordinary and natural sense, charged the plaintiff with the offense of larceny, and that the statement, if made without qualification, was actionable *per se*. With the plea of the general issue, the defendant filed a notice in the nature of justification, in which he alleged that he would prove that the plaintiff, while in his employ, defrauded him in various ways, and fraudulently embezzled and converted to his own use the moneys of the defendant, and obtained the property of others named by false pretenses. A bill of particulars of the alleged embezzlements and larcenies was filed, containing some 27 items, and upon the trial

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defendant introduced testimony which he claims established such embezzlements and larcenies.

The court instructed the jury that—

"The words, 'You are a liar and a thief,' are not actionable, unless the defendant intended to impute the crime of larceny, which the law will presume, if unexplained. If left unexplained, these words are actionable. The circumstances surrounding the speaking of the words, however, may be given in evidence to rebut the presumption of malice, and to show the circumstances under which the words were uttered. * * * The defendant has always been, and is, permitted, in a case like this, to show the matter affecting the meaning of the alleged defamatory language. An action cannot be maintained where the words, although imputing a crime, were accompanied by such an explanation as showed that the crime was not committed. * * * Explanatory circumstances, known to all of the parties, speakers, and hearers, are to be taken into account, then, as a part of the words. * * * The test in such case is the knowledge possessed by those to whom the language is published. The question now is, not what the defendant meant by the words he spoke, but what reasonable men, hearing the words, would understand them to mean. * * * The word 'thief' may be so used, qualified, or explained as to show that it was intended to have a different meaning, and not to mean larceny, or any crime at all."

The court instructed the jury that in such case the plaintiff could not recover. The foregoing instruction was elaborated, and applied to the question in the case, and, in our opinion, made it plain that the defendant should not be found guilty if the circumstances showed that the words ought not to have been understood in their ordinary sense. This charge follows the rule laid down in *Ellis* v. *Whitehead*, 95 Mich. 105, where a similar question was considered.

It was contended by counsel for the appellant that the evidence showed that the plaintiff was guilty of embezzlement from the defendant, and that he cheated and

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defrauded him, and wrongfully converted his property, and that the court should have so instructed the jury, and that embezzlement was larceny, and proof of it amounted to a justification of the charge of larceny. The court instructed the jury that proof of cheating, trickery, and fraud, unless it amounted to actual theft, would not amount to a justification, and that no taking or conversion would amount to larceny or embezzlement—which he said was statutory larceny—unless it included a felonious intent to convert the property taken or misappropriated to his own use. It was thus left to the jury to find a justification by embezzlement, if the necessary elements to establish it were found. We think the court did not err in saying that a charge of being a thief could not be justified by showing the plaintiff guilty of cheating, fraud, or false pretenses, and there was no error in refusing the numerous requests upon these subjects.

We think it unnecessary to discuss other assignments of error. In our opinion, the court submitted the disputed questions of fact to the jury under a fair charge, and the judgment is therefore affirmed.

The other Justices concurred.

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## VAN BAALEN *v.* COTNEY.

NOTICE—POSSESSION—MORTGAGEE AND PURCHASER.

Possession by one claiming through the purchaser under a land contract is constructive notice of his rights to a subsequent mortgagee of the vendor.

Appeal from Wayne; Donovan, J. Submitted April 27, 1897. Decided May 28, 1897.

Bill by Isaac Van Baalen against Catherine Cotney and others to foreclose a mortgage. From a decree for defendants, complainant appeals. Affirmed.

*George H. Prentis*, for complainant.

*John G. Hawley*, for defendants.

HOOKER, J. The complainant and appellant filed the bill in this cause to foreclose a mortgage made October 26, 1893, by Catherine Cotney, upon premises which she had previously sold on a written contract to Paeschke, and which he sold to Wallinger on April 5, 1892. Wallinger took immediate possession, and has retained it since. This possession was constructive notice of his rights, and the circuit judge was justified in denying foreclosure, and requiring the complainant to discharge the mortgage.

His decree is affirmed, with costs.

The other Justices concurred.

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## ST. JOHNS NATIONAL BANK *v.* TOWNSHIP OF BINGHAM.

1. TAXES—PERSONAL PROPERTY—SALE BEFORE LIEN ATTACHES.
   A purchaser of bank stock prior to December 1st takes it free from any lien for taxes, under Act No. 206, Pub. Acts 1893, § 40, providing that all personal taxes shall become a lien on personal property on December 1st in each year, and shall take precedence of any sale, mortgage, or other lien executed or made "after" that date.

2. SAME—BANK STOCK.
   A bank cannot be compelled to use its assets to pay a tax on certain shares of its stock where it cannot reimburse itself against the stock, as provided by law.

3. SAME—SUIT AT LAW—EQUITABLE RELIEF.
   A bank cannot maintain a bill to restrain the prosecution of an action at law to recover a tax assessed against certain of its stock, on the ground that such stock was transferred by the owner before the tax became a lien, since that fact may be set up as a defense to the suit at law.[1]

Appeal from Clinton; Daboll, J. Submitted April 28, 1897. Decided May 28, 1897.

Bill by the St. Johns National Bank against the township of Bingham to restrain the prosecution of a suit to collect a tax. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

*Spaulding & Norton*, for complainant.

*Will H. Brunson*, for defendant.

LONG, C. J. The bill in this case alleges that in May, 1895, the supervisor of the township of Bingham listed against Robert M. Steel, of St. Johns, certain real and

[1] An extensive collection of authorities respecting the use of an injunction against the collection of illegal taxes is found in a note to *Odlin* v. *Woodruff*, (Fla.) 22 L. R. A. 699.

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personal property, and also "stock of St. Johns National Bank," at the valuation of $26,650, and that on the tax roll he afterwards assessed a tax on said stock in the sum of $429; that he listed like "stock" against George A. Steel, and assessed a tax upon it in the sum of $45.95; that he listed like "stock" against Robert G. Steel, and assessed a tax upon it in the sum of $30.63; and that on November 30, 1895, the said supervisor delivered the tax roll and his warrant to the township treasurer. The bill further alleges that the several taxes became a personal debt against the said taxpayers from the date of its assessment, and a lien upon their personal property on December 1, 1895. It further alleges that the said Robert M. Steel sold 220 shares of said stock to the St. Johns National Bank, for full value, on the 18th day of October, 1895, and due transfer of it was then made on the books of the bank; that on September 13, 1894, he pledged other 50 shares of said stock to one John Hicks, to secure an indebtedness exceeding the value of the stock; that the certificates of said stock were then delivered to said Hicks, who held them till December 13, 1895, when they became the absolute property of said Hicks, who sold 28 of said shares to C. C. Vaughan, and transfer of the entire 50 shares was then made on the books of the bank,—28 to Vaughan, and 22 to Hicks; that the said 270 shares represented all the holdings of said Steel in the stock of said bank; that George A. Steel sold all his stock in said bank (30 shares) to said bank, for full value, December 4, 1895; that said Robert G. Steel sold all his stock (20 shares), for full value, as follows: To E. G. Bement, 5 shares, August 13, 1895; and to the Clinton County Savings Bank, 15 shares, December 2, 1895. It is further alleged that in the month of February, 1896, the township treasurer demanded said taxes of Peter E. Walsworth, cashier of said bank, who then informed the said treasurer that none of the Steels held any stock in said bank, and that the said treasurer should make the taxes out of the said taxpayers or their

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personal property. The bill alleges that there was an abundance of personal property in said township belonging to said taxpayers, and upon which the said taxes were a lien, out of which said taxes could be made by distress and sale, in accordance with the mandate of the warrant, but that on the 29th day of February the said treasurer, instead of pursuing said personal property or the taxpayers themselves, who were financially responsible, brought suit to recover the said taxes from the bank in the name of the township, and that he then returned his tax roll and warrant to the county treasurer, and took out a supplemental warrant for the collection of said taxes, and still holds said warrant; that said suit at law is at issue; that the bank cannot adequately defend at law; and restraint of said suit at law is prayed. The defendant interposed a general demurrer to the bill for want of equity, and, upon the hearing, the bill was dismissed. From this decree the complainant appeals.

The transfer of 220 shares of stock was made to the bank by Robert M. Steel before the tax became a lien upon the stock. Under section 40, Act No. 206, Pub. Acts 1893, all personal taxes become a lien on personal property on the 1st day of December in each year, "and shall take precedence of any sale, assignment, or chattel mortgage, levy, or other lien on such personal property, executed or made after said 1st day of December, except where such property is actually sold in the regular course of trade." Thus, the statute, by implication, recognizes that the purchaser, or one who takes by assignment, etc., takes it free from any lien for taxes, if the sale or lien, etc., is made before December 1st. The bill also alleges that on September 13, 1894, Robert M. Steel assigned to John Hicks 50 shares of stock, as security for an amount exceeding the value of the stock, and that on December 13, 1895, Hicks obtained the ownership of it. It also appears that on August 13, 1895, E. G. Bement acquired by purchase 5 shares, at their full value, from Robert G. Steel. The sale to Bement was prior to the lien of the

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township for the taxes. The lien of Hicks was also prior to the lien of the township, and made so by the statute, and exceeded the value of the stock. All these shares of stock, amounting to 275 shares, had been sold prior to the tax lien, and the bank certainly could not be held to pay the taxes thereon. This covered all the holdings of Robert M. Steel in said bank.

Robert G. Steel had left, of his holdings, 15 shares, which, on December 2d, he sold to the Clinton County Savings Bank. George A. Steel held his stock (30 shares) till December 4th, when he sold it to complainant. When these last two sales were made, the taxes had become a lien, and the shares were liable for the taxes. The bank, in its purchase from George A. Steel, took the 30 shares subject to the lien, upon which the complainant must pay, and also upon the 15 shares sold to the Clinton County Savings Bank. *Eyke* v. *Lange*, 104 Mich. 26. The defendant in no event would have the right to compel the bank to pay upon the other shares, the sale having been made before the tax became a lien. A bank cannot be compelled to use its assets to pay a tax where it cannot reimburse itself against the stock, as provided by law. *City of Boston* v. *Beal*, 51 Fed. 306; *City of New Orleans* v. *Houston*, 119 U. S. 265. If this could be done, it would substantially be a tax upon the corporation itself.

It is contended, however, that a suit in equity cannot be brought to restrain the collection. We agree with counsel in this contention; but, to save the parties the expense of prolonged litigation, we have discussed the merits of the case. This will not be taken as a precedent in future cases. In the defense to the action at law brought by the township, this defense could be set up. It is purely a legal one, and is devoid of any equitable considerations. Every ground for relief set up in the bill is, if shown, a complete defense to the suit at law, so far as the tax upon the stock transferred before the tax became a lien is concerned. The case is not like *Lenawee Co. Sav. Bank* v. *City of Adrian*, 66 Mich. 273. There the

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collector was proceeding to enforce the payment of the tax by seizure of the bank furniture and fixtures. Neither was the question raised in that case, and it appeared that irreparable injury might be done, and the court interfered to prevent it.

The court properly sustained the demurrer and dismissed the bill. That decree will be affirmed, with costs of both courts to the defendant.

The other Justices concurred.

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## CARVER *v.* SMITH.

1. APPEAL FROM JUSTICE'S COURT—JURISDICTION.
   The return of a justice, in a cause appealed to the circuit court, that plaintiff declared in a plea of trespass on the case, that defendant pleaded the general issue, and that judgment was rendered for the plaintiff, is sufficient to confer jurisdiction.
2. SAME—LOST FILES—AMPLIFICATION OF RETURN—PROCEDURE.
   Where the defendant in a cause appealed from justice's court appears in the circuit, and objects to the court's taking jurisdiction because no declaration is returned, plaintiff may be permitted to show by the affidavit of the justice, without formal motion, that the original declaration has been lost, and that a declaration attached to the affidavit is, to the best of affiant's knowledge and belief, the same as that filed in justice's court.

Error to Wayne; Hosmer, J. Submitted April 28, 1897. Decided May 28, 1897.

Case by Walter Carver against Horace Smith for breach of warranty. From a judgment for plaintiff, defendant brings error. Affirmed.

*Hamilton Baluss*, for appellant.

*A. Ward Copley* and *E. M. Vining*, for appellee.

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HOOKER, J. The return of the justice shows that the plaintiff declared in a plea of trespass on the case, and that the defendant pleaded the general issue. Upon the trial the justice rendered judgment for the plaintiff for $30, from which the defendant appealed. At circuit, and before trial, the defendant raised the point that there was no declaration, and that the trial should not proceed without one. Counsel for plaintiff then offered an affidavit of the justice that the declaration was lost, and that he could not find it after diligent search, and that a declaration attached to the affidavit was, to the best of his knowledge and belief, the same as the one filed in justice's court. The circuit court allowed this affidavit to be filed, subject to objection, and proceeded with the trial. The court, under a misapprehension, said that a declaration might be filed later, and that he would consider it filed and proceed. As a fact, the declaration was attached to the affidavit filed, and it was soon brought to the attention of the court, by defendant's counsel himself, in connection with an objection that certain testimony tending to show unsoundness in a mare had no basis in the declaration. The court overruled the objection.

It is contended:

1. That the return of the justice did not confer jurisdiction on the circuit court.
2. That, if the plaintiff wished to complete the court's jurisdiction, he should have made a motion and showing, and given notice.
3. That the evidence should have been excluded, as there was no issue before the court.
4. That the new declaration was in *assumpsit*, and changed the form of action.
5. That no cause of action was set out in the declaration, and no issue was joined.
6. That the court erred in permitting the filing of this declaration, as the affidavit did not show that he knew or remembered the substance of the declaration filed, and the statute (2 How. Stat. §§ 7639–7642) was not followed.

We think there is no error in the record. The return of the justice conferred jurisdiction, and a formal motion

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to supply the declaration was not necessary, under the circumstances. The defendant raised the question when the case was reached for trial, and, being personally present, had notice of the application. A broad discretion is given to courts of general jurisdiction, in perfecting an issue by amendment, or supplying lost files, and we should not interfere with it where no hardship has been suffered. Had the defendant asked to be allowed to file a demurrer to the declaration, or to add to his plea of the general issue, and been refused, to his injury, we would be called upon to consider the question, but we do not discover that he did so.

The declaration filed counts in trespass on the case for a breach of warranty, which, for aught that appears, was the identical question tried by the justice.

We discover no error, and the judgment is affirmed.

The other Justices concurred.

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## PEOPLE v. HILLER.

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STATUTES — AMENDMENT AND REPEAL — MISAPPROPRIATION BY ADMINISTRATOR.

3 How. Stat. § 9191*a*, provides a penalty for the willful neglect of an executor or administrator to deliver over to his successor in trust upon order of the court, within 30 days, all goods, chattels, money, or effects of the deceased which he has received and appropriated to his own use. Act No. 51, Pub. Acts 1895, purporting to be amendatory thereof, extends the time for compliance to 60 days, and increases the maximum penalty for disobedience, but contains no saving clause. *Held*, that the earlier statute was repealed by the later one, and that no conviction could thereafter be had for a violation of the former.



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Exceptions before judgment from Lenawee; Peck, J., presiding. Submitted April 29, 1897. Decided May 28, 1897.

Thomas J. Hiller was convicted of embezzlement. Reversed.

*James H. Davitt*, for appellant.

*D. B. Morgan*, Acting Prosecuting Attorney, for the people.

MOORE, J. December 12, 1895, a warrant was issued against the respondent, charging him with the crime of embezzlement. Later an information was filed, charging him with the same offense. Upon the trial he was convicted. A number of errors are assigned. The only ones we need to discuss grow out of the question as to whether Act No. 51, Pub. Acts 1895, had the effect to repeal section 9191*a*, 3 How. Stat. The last-named section reads:

"*The People of the State of Michigan enact*, That if any general or special administrator, or any executor or guardian, who has been appointed by a judge of probate, and who has collected any goods, chattels, money, or effects of the deceased, and willfully appropriated the same to his own use, and who has been ordered by the judge of probate to forthwith deliver to his successor in trust all the goods, chattels, money, or effects of the deceased in his hands, shall willfully omit, neglect, or refuse for 30 days to obey said order, he shall be deemed to have committed the crime of embezzlement, and shall, upon conviction thereof, be imprisoned in the state prison not more than two years, or by fine not exceeding one thousand dollars," etc.

The amendment of 1895 changed the law by making the period of omission, neglect, or refusal to obey the order 60 days, instead of 30; and the penalty for the violation of the law, imprisonment for not more than five years, instead of two years, or fine of not more than $2,000, instead of $1,000. Nothing was said in the act of 1895 about repealing any other law, nor did it contain any saving

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clause. The act purported to be an act to amend the act as it then existed. It is insisted by respondent that the effect of the enactment of the amendatory act was to repeal the penalty clause in the act of 1889; that the offense charged in the information was committed (if any was committed) before the act of 1895 took effect, and that to apply the penalty provided in the act of 1895 to an offense committed before it took effect would make an *ex post facto* law of it; and that, therefore, the respondent could not be convicted of the offense charged in the information.

Repeals by implication are not favored. 23 Am. & Eng. Enc. Law, 489, 496; Suth. Stat. Const. § 138; End. Interp. Stat. § 210; *Crane* v. *Saginaw Circuit Judge*, 111 Mich. 496; *People* v. *Grand Rapids, etc., Plank Road Co.*, 67 Mich. 9. The contention of the counsel for the respondent, if allowed to prevail, is likely to result in the escape of some guilty men from deserved punishment, and should not prevail unless sustained by the undoubted weight of authority.

It is held, where an act or portion of an act is amended "so as to read" in a prescribed way, that the section amended is entirely repealed, and that as to all matters contained in the original enactment, and not incorporated in the amendment, the latter must be held to have the effect of a repeal. End. Interp. Stat. § 196; 23 Am. & Eng. Enc. Law, 488; *Blakemore* v. *Dolan*, 50 Ind. 194; *Goodno* v. *City of Oshkosh*, 31 Wis. 127. A statute providing for or defining an offense created by a previous statute, and providing a materially different punishment, repeals the former act. Suth. Stat. Const. § 143 (p. 193); *Wilson* v. *Railway Co.*, 64 Ill. 542 (16 Am. Rep. 565); *State* v. *Campbell*, 44 Wis. 529. We understand the rule to be, in criminal cases, in the absence of a saving clause, that where the penalty is altered in degree, but not in kind, by increasing the punishment which may be imposed, the effect of enacting the increased penalty is to repeal the earlier provision. End. Interp. Stat. § 239; *State* v. *Inger-*

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*soll*, 17 Wis. 631; *State* v. *McDonald*, 20 Minn. 136. The repeal or expiration of a statute imposing a penalty or forfeiture will prevent any prosecution, trial, or judgment for any offense committed against it while it was in force, unless the contrary is provided in the same or some other existing statute. Suth. Stat. Const. § 166; *Com.* v. *Kimball*, 21 Pick. 373; *State* v. *Van Stralen*, 45 Wis. 437; 23 Am. & Eng. Enc. Law, 512, and many cases there cited; *Kring* v. *Missouri*, 107 U. S. 221; *In re Medley*, 134 U. S. 160; *Wilson* v. *Railway Co.*, 64 Ill. 542. For an interesting discussion of some of the principles involved in this case, see *People* v. *Bussell*, 59 Mich. 110.

The only exceptions to the rule herein stated are where the State enacting the new legislation has a general law which operates as a saving clause, or where the new legislation indicates very clearly that its provisions are to apply only to offenses thereafter committed. It was doubtless competent for the legislature to continue the penalty for offenses committed under the old law, after the new law took effect, by attaching to the new law a saving clause, or by indicating in the law itself that its provisions were to attach only to offenses committed after the law became operative; but neither of these things was done. On the contrary, the law of 1895, by its terms, applies to any administrator, executor, or guardian "who has been appointed by a judge of probate," etc.

We think it necessarily follows, from what has already been said, that the verdict must be reversed, and respondent discharged.

The other Justices concurred.

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## PEOPLE v. BARNES.

1. INTOXICATING LIQUORS — ILLEGAL SALE — REMARKS OF PROSECUTOR.

Upon a prosecution for keeping a place for the sale of intoxicating liquors in violation of the local option law, the contents, occupants, and appliances of respondent's place of business, and their adaptability to traffic in liquor, are proper matters of inquiry, and the prosecutor, therefore, has the right to "submit" in his argument that the room which the respondent is charged with keeping was fitted up for the express purpose of violating the law.

2. SAME—LOCAL OPTION LAW—PRINCIPALS IN CRIME.

All who aid and assist in keeping a place where intoxicating liquor is sold in violation of the local option law, whether as owner or clerk, are principals. *People* v. *Rice*, 103 Mich. 350, followed.

Exceptions before judgment from Van Buren; Buck, J. Submitted April 29, 1897. Decided May 28, 1897.

Will Barnes was convicted of violating the local option law. Affirmed.

*T. J. Cavanaugh*, for appellant.

*James E. Chandler*, Prosecuting Attorney, for the people.

HOOKER, J. On appeal from a conviction of the offense of "keeping a place where intoxicating liquors were sold" on and between the 1st day of July and the 6th day of August, 1895, the defendant relies upon the following errors:

1. That the prosecuting attorney, in his argument, said to the jury, "I submit to you that this room was fitted up for the express purpose of a violation of the local option law, so no one would be caught at it."

2. That the court failed to direct an acquittal upon the

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ground that another person had been convicted of keeping said place at the time covered by the complaint.

3. That the court erred in his charge as to the effect of circumstantial evidence.

It was proper to take into consideration the character of the place, its contents, occupants, and appliances, as bearing upon the question whether or not it was a place where intoxicating liquor was sold. The prosecuting attorney seems to have argued to the jury that it was, and we think the evidence justified it. His language was not an assertion of a fact, not even a statement that it was his inference from the testimony, but he *submitted* to the jury the propriety of finding the fact stated. This he had a right to do, under the evidence.

The second question is ruled by the case of *People* v. *Rice*, 103 Mich. 350, 359, where it was held that all who aid or assist in keeping a place of this character, whether as owner or clerk, are principals.

The instructions relating to circumstantial evidence appear to fairly cover the question, and we think the case is devoid of error.

The conviction is affirmed.

The other Justices concurred.

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## KELSEY v. BOARD OF FIRE & WATER COMMISSIONERS OF MARQUETTE.

1. WATER RATES—LIABILITY OF OWNER—RULES AND REGULATIONS —WAIVER.

   The right secured to a board of water commissioners by charter to treat with the owner of an office building, rather than with the several tenants, is not waived by its superintendent's unauthorized act in assessing water rates, at the owner's request, to the tenants, upon the understanding that the owner should remain liable if the tenants failed to pay.

2. SAME.

   The duty of furnishing water separately to each tenant of a building, and collecting rates from each as a separate consumer, cannot be imposed by the owner of the premises on the board of water commissioners by furnishing at his own expense, for each room, shut-offs with locks and keys, and then tendering the keys to the commissioners.

Appeal from Marquette; Stone, J. Submitted April 30, 1897. Decided May 28, 1897.

Bill by Charles Kelsey to restrain the Board of Fire & Water Commissioners of the city of Marquette from shutting off the water from a certain building. From a decree for complainant, defendant appeals. Reversed.

Complainant, a resident of the city of Marquette, occupied as tenant an office on the second floor in the building known as the "Nester Block," in the said city. He is also the agent of Morrison & Scott, the owners of the building, and has charge thereof. The building has a frontage of five stores, and is four stories high. The basement is occupied by a barber shop and offices; the first story, by stores; the second, third, and fourth, by offices. The complainant's office, as are also most of the others, is supplied with water by the defendant, and has been ever since the erection of the building. Each

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office has a wash-bowl. Water is also furnished for the engine and boilers with which the building is heated, for running the elevator, and for closets. Since its erection, until 1895, the defendant was in the habit of issuing permits and rendering bills to the occupants of each office, which have generally been paid by them. Bills for the boiler, closets, and elevator have been rendered to the owners of the building. In May, 1895, after the dispute arose, Morrison & Scott supplied every water fixture in the block with shut-offs, with lock and key, and tendered these keys to the defendant, with authority from them to shut off any tenant who did not pay for the water. The leases between Morrison & Scott and their tenants require each tenant to pay "all gas, electric light, and water rates properly chargeable against said premises." There was a single service pipe from the street main to the building, and, from this service pipe, pipes were carried to the different rooms and stores. A shut-off was placed near the sidewalk in the street, so that the water could be shut off from the building. It appears that some of the tenants did not pay the water rates, and, when Morrison & Scott purchased the building, they paid the amounts which were in arrears. In 1894 the defendant concluded to deal only with the owners of the building, to charge the rates to them, and to shut off the water if they were not paid. Bills were so rendered in 1895, and trouble arose, which was finally settled by the payment of the bills. In May, 1896, the defendant again threatened to shut off the water because of unpaid bills. The complainant tendered the amount due upon his office, which was refused, except to apply upon the entire amount due from the building, and defendant threatened to shut off the water from the building. Thereupon the complainant filed this bill for a permanent injunction against such action, and obtained a decree.

*The Charter:* The defendant was organized under Act No. 243 of the Laws of 1869. It is a special act, and its

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provisions, so far as they relate to this question, are as follows:

"Sec. 6. It shall be the duty of said commissioners to examine and consider all matters relative to supplying said village of Marquette with a sufficient quantity of pure and wholesome water for domestic use; also, to provide suitable and efficient means for the extinguishment of fires."

Section 10 confers the power upon, and makes it the duty of, the commissioners to purchase such lands and materials, and construct such reservoirs, buildings, machinery, and fixtures, as shall be deemed necessary to furnish an ample supply of water for public and private use.

"Sec. 13. Said commissioners shall, from time to time, cause to be assessed the water rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they shall deem equitable; and such water rate shall be a continual lien until paid, upon such house or other building, and upon the lot or lots upon which such house or other building is situated.

"Sec. 14. Said commissioners shall have power to make and enforce all necessary by-laws and regulations for the collection of said water rates, either by the appointment of collectors to demand the same, requiring payment at the office, shutting off the water, or by a suit at law before any court of competent jurisdiction, or by sale of the lot or premises upon which such rates shall have become a lien: *Provided*, that such sales shall be conducted in the same manner and have the same force and effect of sales of lots delinquent for village taxes; *and provided further*, that the attempt to collect said rates by any process above mentioned shall not in any way invalidate the lien upon the said lot or premises."

"Sec. 24. The said commissioners are hereby invested with full power to make and enforce such by-laws, regulations, and ordinances as may be necessary to carry into effect the object and intent of this act, and to supply any mode or power not already specified herein, and shall cause all such by-laws, regulations, and ordinances to be entered in a book to be kept for that purpose, and signed

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by the president and secretary, which, when so entered and signed, shall be evidence in any court of justice."

*Rules and Regulations:* Rules and regulations were adopted by the board, to the number of 13. So far as they are essential to this controversy, they are as follows: Rule 2 provides that—

"All applications for a permit to connect service pipe with the distributing pipe must be made at the office of the board, by *the owner of the premises, or some person duly authorized by him,* and the sum of $10 paid in advance for permit, service cock, stop cock, and a service pipe one-half inch in diameter from the street main to the outer edge of the sidewalk, including the laying of the same."

This rule further states fully what the application must contain. Rule 3 provides a penalty for misrepresentation, or use of water without permit, etc. Rule 4 is as follows:

"Water rates are due and payable in advance at the office of the treasurer of the board on the first days of May and November in each year. Ten per cent. will be added if not paid within 30 days thereafter, and the water shut off without notice, and not turned on again except upon the payment of all arrearages, and, in addition thereto, the sum of two dollars for closing and opening the street stop cock. After expiration of time allowed for payment without addition of the 10 per cent. penalty, the same shall be paid only to the secretary of the board."

Rule 5 relates to private hydrants for fire use. Rule 6 provides that the employés of the board must have free access at proper hours to all parts of every building, to examine pipes and fixtures, and ascertain whether there is any unnecessary waste of water. Rules 7 and 8 refer to plumbers. Rule 9 provides for the laying of service pipes, and the insertion of stop cocks therein. It is unnecessary to refer to the other regulations.

*Contentions of the Parties:* Complainant insists that he is entitled, upon paying or tendering his water rates, to be furnished with water, and that defendant has no right to shut off the water from his office because other

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tenants in the building are delinquent. The defendant insists that it has the right to deal solely with the owners of buildings, and charge the entire amount against such owners, and to proceed in any of the methods provided by its charter for enforcing payment. The learned circuit judge held with the complainant, basing his opinion upon two facts: *First*, that there is no rule of the board declaring that it will deal with the owners only in the rendering of its bills and collecting of its rates; and, *second*, that the defendant has, by its practice in granting permits and rendering bills, elected to treat the complainant and those similarly situated as water takers so long as they pay the rates and comply with its regulations.

*Hill & Rood* (*A. B. Eldredge*, of counsel), for complainant.

*Clark & Pearl*, for defendant.

GRANT, J. (*after stating the facts*). The charter of the defendant provides for furnishing water to the *owners or occupants* of houses and other buildings. It does not contemplate that the defendant shall furnish water to each tenant who occupies a separate room in any house or building. It also provides various methods for enforcing collection of the rates. Counsel for complainant concede that the rates are a lien upon the building, and that the building can be sold for nonpayment of the rates by any tenant. The rules and regulations provide for dealing with the *owners*, and not with tenants. The application is required to be made by the *owner or some person duly authorized by him*. The defendant has supplied only one service pipe from the street main to the building, and has provided for one shut-off in the street. This has been the universal custom. It is not, and cannot be, contended that defendant, under its charter, is not vested with the power and right to treat alone with the owner or occupant of the building as an entirety. If such owner or occupant rents rooms to tenants, he has not the right, under the charter, to compel the defendant to deal with his tenants,

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and to collect the rates from them. Morrison & Scott, in their leases with their tenants, recognize that they are liable to the defendant, and therefore provide that their tenants must pay for the use of the water. The defendant has made no rule or regulation authorizing its officers or employés to deal with tenants, or to collect from them. The superintendent has done this as an accommodation to owners, and without authority, except as it may be implied from his course of business, known to its officers. Their practice in this regard, however, has not been uniform, and in some instances it has, at the request of property owners, assessed the rates to their tenants, but with the express agreement that the owner should pay if his tenants were delinquent. We do not think that this custom can be construed into a regulation perpetually binding upon the defendant. Until the difficulty arose over the nonpayment of rates by some of the tenants of the Nester Block, no provision had been made for shutting off the water in each room. The only method, therefore, for enforcing payment by shutting off the water, was by the use of the shut-off in the street. Morrison & Scott now seek to fasten this duty upon the defendant by furnishing, at their own expense, shut-offs, with locks and keys, in each room, tendering the keys to the defendant, and thus forcing it to relieve them from the collection of the rates. The charter authorizes the defendant to make all necessary rules and regulations for collecting its dues. We see nothing unreasonable in the method which it was pursuing.

The authorities cited in behalf of complainant do not sustain his contention. In *Red Star Line Steamship Co.* v. *City of Jersey City*, 45 N. J. Law, 246, the sole question was the right of the company to charge consumers with the cost of expensive meters, and it was held that no such right was conferred by the charter. In *U. S.* v. *American Waterworks Co.*, 37 Fed. 747, the waterworks ordinance provided that the company should furnish water to its citizens residing along the line of its

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mains, at certain rates, and at a tariff for *dwelling houses* according to the number of rooms, and other buildings of different kinds. The United States reservation known as "Fort Omaha" contained dwellings for officers, and other buildings. The United States claimed the right to be furnished as a single consumer for the entire reservation, including all its buildings. It was held that the company had the right to treat *each building* separately. In *Lumbard* v. *Stearns*, 4 Cush. 60, the act under which the water company was organized was attacked as unconstitutional because it contained no express provision requiring the corporation to supply all families and persons who should apply for water, on reasonable terms. It was contended that it might supply some houses and lots, and refuse to supply others. Chief Justice Shaw said, "This would be a plain abuse of their franchise." In *McCrary* v. *Beaudry*, 67 Cal. 120, the water company assumed the right to shut off the water, without any reason, from the *owner* of the premises. In *Price* v. *Irrigating Co.*, 56 Cal. 431, the defendant was organized "to furnish, sell, give, and supply water to any person or corporation, for irrigation, mechanical, or other purposes." It refused to supply plaintiff with water, claiming the right to appropriate all the water to its own use, "as another sort of corporation." In *Young* v. *City of Boston*, 104 Mass. 95, the charter required the city to furnish water to "*the occupant of any tenement.*" An ordinance was passed by the city, providing for the use of water in "model houses," so called. These were similar to apartment houses or flats. A model house was one of those apartments used and occupied as a separate tenement. The city sought to deprive such tenant of the use of water. It was held that "this model lodging house was a 'tenement,' within the meaning of the ordinance." In *Wood* v. *City of Auburn*, 87 Me. 287, the city had purchased the waterworks, had accepted payment for six months in advance from the complainant, who was the *owner* of the tenement building, and sought to shut off the water

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for the nonpayment of rates before the city purchased. It was held that the city, having accepted payment in advance, could not shut off the water for an old debt. In *State* v. *Butte City Water Co.*, 18 Mont. 199, the *owner* of the building had given an order upon the defendant to the tenant to supply him with water. The tenant was in possession of, and required and demanded the use of water for, the entire premises. The company refused to deal with the tenant, or to let him have water, notwithstanding the tender of payment for the entire building.

It needs no argument to show that these authorities are not decisive upon the question before us.

We find nothing in the action of the defendant which was unreasonable, or which will result in depriving complainant or any other tenant of the use of water. The object is apparent,—to relieve Morrison & Scott of the collection of the rates from their tenants, and to impose that duty upon the defendant.

The decree is reversed, with the costs of both courts, and the bill dismissed.

The other Justices concurred.

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## BELDING v. MELOCHE.

1. LAND CONTRACTS — RENTS AND PROFITS — RECEIVER PENDING FORECLOSURE—DEFICIENCY.

   A receiver, appointed to collect the rents and profits of premises pending foreclosure proceedings under a contract providing that, on default of the purchaser, the vendor may re-enter without notice, may be required to pay over to complainant the money so received, to apply upon a deficiency remaining after sale, where the purchaser seeks to appropriate such funds, to the exclusion of complainant's claim.

2. FORECLOSURE—PERSONAL DECREE—WAIVER.

   An objection that the complainant in a foreclosure suit was not entitled to a personal decree for a deficiency, because, upon the trial, his counsel stated that they did not ask a personal decree, is not available on appeal, where it was not set up in the answer to the petition for such decree, nor claimed upon the hearing.

Appeal from Ionia; Davis, J. Submitted April 30, 1897. Decided May 28, 1897.

Foreclosure bill by Milo M. Belding and Alvah N. Belding against Albert F. Meloche, Napoleon H. Meloche, and others. Complainants obtained a decree, and, after a sale thereunder, filed a petition for the application of certain moneys in the hands of the receiver to the payment of a deficiency, and for a personal judgment for the balance then remaining due. From a decree for complainants, defendants Meloche appeal. Affirmed.

*McGarry & Nichols*, for complainants.

*R. A. Hawley*, for appellants.

HOOKER, J. On May 2, 1892, the complainants sold to the Meloches (two of the defendants), upon contract, a business block in the village of Belding, at an agreed

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price of $36,000, to be paid in 120 monthly installments of $300, without interest. The contract does not expressly state that the vendees shall be entitled to possession, but does provide that, in case of default, the vendors may—

"Elect to consider themselves released and discharged of and from any and all liability in any of the covenants specified to be done and performed by them, and all improvements made by the said parties of the second part shall be deemed forfeited as stipulated damages for the nonfulfillment of this contract, and said parties of the first part, or their authorized agent, may, without notice to quit or demand of possession, re-enter into and repossess the said premises, and the said parties of the second part, and each and every occupant hired by, through, or under them, to remove and put out; it being expressly understood that such failure of said second parties shall forfeit all claim, either in law or in equity, which might otherwise exist on the provisions of this contract in favor of the said parties of the second part."

The vendees made default in the payments, and this bill of complaint was filed to foreclose their rights under the contract. At this time portions of the building were rented, and the bill prayed the appointment of a receiver, to receive the rents and profits of said premises, and such receiver was appointed, and has received said rents. A decree of foreclosure and sale was made, and, after the sale occurred, an order of confirmation was entered. No appeal was taken from any of the proceedings thus far. Subsequently, the complainants filed their petition, alleging that on March 9, 1896, a decree was entered for the complainants for the sum of $6,172.44 and costs, making a total of $6,648.30; that, at a sale of the interest of the Meloches in said premises, the complainants purchased the same for $3,000, and that there was a deficiency of $3,648.30; that the final account of the receiver, duly filed, shows a balance in his hands at the date of the report of $2,349.36, which, after the allowance of compensation to and disbursements by the receiver, would leave $1,856.98, which the petition prays may be applied upon the deficiency, and that it be declared that the remaining defi-

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ciency constitute a personal judgment, upon which execution may issue against the Meloches. A decree was made in accordance with the prayer of the petition, and the defendants Meloche appeal.

It is claimed—*First*, that the court had no authority to appoint a receiver to take the rents during the foreclosure, and that the moneys collected should not be turned over to the complainants; *second*, that there should be no decree for a deficiency against the appellants, because, upon the trial of the case, counsel for complainants stated that they did not care to ask a personal decree.

Counsel bases his first contention upon a class of cases which hold that, under 2 How. Stat. § 7847, the mortgagee is not entitled to the profits of land during foreclosure. See *Wagar* v. *Stone*, 36 Mich. 364. In that case the court said:

"The mortgagor is entitled to the possession during the proceedings taken to foreclose the mortgage, and until a sale has been made and the title of the purchaser has become absolute; and, until the title has become absolute upon a foreclosure of the mortgage, an action of ejectment cannot be maintained by the mortgagee, his assigns, or representatives, to recover possession of the mortgaged premises. 2 Comp. Laws, § 6263. Since the passage of this act, which prevents the mortgagee from obtaining possession until he has acquired an absolute title to the mortgaged premises, the mortgage binds only the lands. The rents and profits of the land do not enter into or form any part of the security. At the time of giving the security, both parties understand that the mortgagor will, and that the mortgagee will not, be entitled to the rents, issues, or profits of the mortgaged premises until the title shall have become absolute upon a foreclosure of the mortgage. Until the happening of this event, the mortgagor has a clear right to the possession and to the income which he may derive therefrom; and the legislature, by the passage of this statute, contemplated that he should have such possession and income to aid him in paying the debt. It would be a novel doctrine to hold that the mortgagee had a right to the profits incident to ownership, and yet that he had neither a legal title nor right to possession. The legislature, in depriving him of the means of



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enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired in case he obtained possession before acquiring an absolute title. To deprive him of this particular remedy, and yet allow him in some other proceedings to, in effect, arrive at the same result, would be but a meaningless proceeding, and would not be securing to the mortgagor those substantial rights which it was the evident intent he should have. We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute. We cannot avoid thinking, however, that for us to so hold would be but a mere evasion of our statute."

In *Michigan Trust Co.* v. *Lansing Lumber Co.*, 103 Mich. 392, 402, we recognized the validity of a contract whereby possession by the mortgagee may precede foreclosure; and the case of *Wagar* v. *Stone* shows that in other States possession may be given to receivers pending foreclosure of mortgages, and the decision in that case is made to rest upon the statute. The statute does not in terms apply to equitable mortgages, if we should hold this to be one. In the *Wagar Case* the court said that the object of the legislature was that the mortgagor "should have possession to aid him in paying the debt;" but in this case the vendees seek to avoid the payment of the debt, and to appropriate the fund in the hands of the receiver, to the exclusion of the complainants' just claim.

Again, it is contended that the complainants are not entitled to a personal decree for the deficiency. This claim seems to rest upon an alleged waiver or estoppel, by what occurred upon the hearing of the original case. It does not appear to have been set up in the answer to the petition, and is said not to have been claimed in the circuit court upon the hearing. We do not discover that this statement is disputed.

Under these circumstances, we think the order of the circuit court in chancery should be affirmed, with costs; and it is so ordered.

The other Justices concurred.

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## SHERWOOD *v.* COMMISSIONER OF STATE LAND OFFICE.

1. WATERS—ISLAND IN GREAT LAKES—TITLE.
   The fee to an unsurveyed island in one of the Great Lakes, situated several hundred feet distant from the mainland, is in the State, and not in the riparian owner.

2. SAME—LAKE HURON—WHAT WATERS WITHIN.
   An island lying contiguous to the mainland of the Upper Peninsula, between Detour Passage and St. Joseph Island, is within the waters of Lake Huron, and not in St. Mary's river.

*Mandamus* by William L. Sherwood against William A. French, commissioner of the state land office, and James T. Bennett, to compel the respondent commissioner to execute a conveyance of certain lands to the relator. Submitted May 4, 1897. Writ granted May 28, 1897.

*John W. Shine*, for relator.

*Fred A. Maynard*, Attorney General, for respondent commissioner.

*Oren & Webster*, for respondent Bennett, shore owner.

HOOKER, J. The relator asks a *mandamus* to compel a conveyance by the state land commissioner to him, as purchaser, of a small, unsurveyed island, lying contiguous to, and 600 feet distant from, the mainland of the Upper Peninsula, between Detour Passage and St. Joseph Island, at or near the north end of Lake Huron. Upon the one hand, viz., by the relator, it is contended that this island is situated in Lake Huron; upon the other, that it lies in St. Mary's river, and is, therefore, owned by the proprietor of the adjoining land, who is said to own to the thread of the stream. We are of the opinion that this island is within the body of water known as Lake Huron,

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and therefore that the case is within the rule of *People* v. *Silberwood*, 110 Mich. 103.

The writ should issue, and it will be so ordered.

The other Justices concurred.

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## PEOPLE *v.* YEAGER

CONSTITUTIONAL LAW—RIGHT TO PUBLIC TRIAL.

Section 18 of Act No. 408, Local Acts 1893, authorizing the judge of the recorder's court of Detroit to exclude from the court room, upon the trial of any cause wherein evidence of licentious, lascivious, degrading, or peculiarly immoral acts will probably be given, all persons except those necessarily in attendance, is unconstitutional as applied to a criminal case, in that it violates the right of the accused to a public trial.[1]

Exceptions before judgment from recorder's court of Detroit; Chapin, J. Submitted May 11, 1897. Decided May 28, 1897.

Joseph H. Yeager was convicted of assault with intent to commit rape. Reversed.

*George F. Robison*, for appellant.

*Allan H. Frazer*, Prosecuting Attorney, and *Henry A. Mandell*, Assistant Prosecuting Attorney, for the people.

MONTGOMERY, J. The defendant was convicted of assault with intent to commit rape, and the case is brought here for review on a single exception. After the

[1] Some other authorities on the right to public trial in a criminal case are found in a note to *People* v. *Murray*, 14 L. R. A. 809.

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jury were sworn, the court excluded from the court room all persons not legitimately interested in the case, but announced that any friend or person that was connected or related to or interested in the defendant himself was not to be excluded; and, finally, in order to carry into effect the order, the court asked all the people to retire from the court room, and directed the officer in attendance to admit any who were relatives or friends of the defendant, and also permitted the representatives of the press to remain, the court saying: "I don't propose to have the court room filled up with people here to embarrass witnesses in this case." The final announcement made by the court was: "I have told the officer not to let anybody in here who is not either a friend of the complaining witness or of the defendant. He will ascertain that fact as they apply for admission. All such people will be admitted, and the public will be kept out." And the court directed the officer to see that that rule was enforced. In making this order, the court acted under the authority of Act No. 408, Local Acts 1893, § 18, which provides:

"Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading, or peculiarly immoral acts or conduct will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereon, to retire and absent himself or herself from the court room during such trial, or any portion thereof."

Whether this statute is effective must depend upon whether the trial provided for may be deemed a public trial; for, if such a trial as is provided for by the statute is not a public trial, the act is plainly in conflict with section 28 of article 6 of the Constitution, which reads as follows: "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury." This constitutional provision was under consideration in the case of *People* v. *Murray*, 89 Mich. 276, 290 (28 Am. St. Rep. 294). In an elaborate opinion,

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Mr. Justice CHAMPLIN, referring to the case of *People* v. *Kerrigan*, 73 Cal. 222, the case relied upon by the prosecution here, made use of the following language:

"I cannot accede to the correctness of the proposition intimated in that case,—that, if a public trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary, when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the State. The Constitution does not stop to inquire of what the person has been accused, or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial. There is no such limitation in the Constitution nor in our statute above quoted from which it can be inferred that 'the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.' Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial, whether civil or criminal. Instances have been referred to by Judge Cooley, in his work upon Constitutional Limitations (5th Ed., at page 380 [star page 312]), where, under certain circumstances, it might be proper to exclude a certain portion of the community from attending trials which would tend to degrade public morals, or would shock public decency, in which he says that at least the young should be excluded. There can be no objection to this, so long as citizens of the State who have arrived at the years of discretion and manhood are permitted to enter freely."

We are constrained to hold that the decision in that case rules the present, and that the order of the learned trial judge was unwarranted.

The conviction will be reversed, and a new trial ordered.

The other Justices concurred.

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## MOTLEY *v.* WICKOFF.

1. PARTNERSHIP—DISSOLUTION—FIRM DEBTS—RELEASE—CONSIDERATION.

   An agreement between copartners upon the dissolution of the firm, whereby one partner assumes all of the firm debts, will not, of itself, support the subsequent promise of a creditor to release the other partner from liability.

2. SAME.

   The promise of one partner to pay a debt of the firm, if made to the creditor himself, may afford a sufficient consideration for the release of his copartner.

3. SAME—PRIVITY.

   The mere statement by a partner, after dissolution of the firm, to one of the partnership creditors, that he has agreed with his copartner to pay the firm's indebtedness, and the creditor's reply of "all right; pay as fast as you can," does not establish a privity between them as to the obligation of the former to pay the debt individually.

Error to Ionia; Davis, J. Submitted May 11, 1897. Decided May 28, 1897.

*Assumpsit* by Ara E. Motley against James Wickoff, retiring partner of the firm of Gill & Wickoff, to recover the amount of a copartnership debt. From a judgment for plaintiff, defendant brings error. Affirmed.

*W. H. Howard* (*McGarry & Nichols*, of counsel), for appellant.

*Wesley H. Mains*, for appellee.

MONTGOMERY, J. This case was determined by the circuit court upon an agreed state of facts. The defendant and one Gill, as copartners, became indebted to the plaintiff in the sum of about $140. In April, 1891, Wickoff retired from the firm of Gill & Wickoff, and Gill, in con-

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sideration of the partnership property all being turned over to him, assumed the payment of all the partnership debts. After the dissolution of the firm, and before this action was brought, the amount had been reduced from $140 to $116, by payments to plaintiff made by Gill. It further appears that Gill, shortly after the dissolution, stated to plaintiff that he had assumed, and agreed with Wickoff to pay, all the partnership indebtedness, and that to said statement plaintiff replied, "All right; pay as fast as you can;" that, some time after the dissolution, defendant saw the plaintiff, and stated to him that, according to the terms of the dissolution between himself and Gill, Gill was to pay the sum due and owing to the plaintiff, and asked plaintiff if he would release him (defendant) from the indebtedness, to which plaintiff replied that he would. Upon this state of facts, the case was submitted to the court, upon a stipulation that the plaintiff was entitled to recover if the court should find that the defendant had not been released from the indebtedness. The court found, as matter of law, that there was no consideration for the promise of the plaintiff to defendant to release him from his liability on the partnership indebtedness, and entered judgment for the amount claimed, with costs.

Defendant suggests, rather than urges, that the case is one where the rule adverted to in *Webber* v. *Alderman*, 102 Mich. 638, namely, that where the surety is induced to forego or relinquish means of indemnity to which he might otherwise have resorted, by the promise of the creditor to exonerate the surety, this may work an equitable estoppel to deprive the promisor of the power to retract, is applicable. But there are no facts found in this case which make this rule at all pertinent. There is no finding that the responsibility of Gill has in any way been changed, or that defendant has changed his position in the matter because of any assurances given by plaintiff.

The case must turn upon the question of whether there was a consideration to support the promise to look to Gill

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alone. The authorities are not agreed upon the question of whether the agreement of one joint debtor or copartner to pay the debt upon which the two are liable is a sufficient consideration to support a release of his co-debtor. The modern English doctrine appears to be that such an undertaking is a sufficient consideration, on the ground that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and that whether it was actually a benefit in each particular case will not be inquired into, but that the changed relation will be held to be a sufficient consideration. See *Thompson* v. *Percival*, 5 Barn. & Adol. 925, and *Lyth* v. *Ault*, 7 Welsb., H. & G. 669. This doctrine has also found support in this country, to the extent stated in *Collyer* v. *Moulton*, 9 R. I. 90 (98 Am. Dec. 370), in which it was said:

"If, by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration; one debt would have been substituted for the other."

See, also, *Bantz* v. *Basnett*, 12 W. Va. 772; *Bowyer* v. *Knapp*, 15 W. Va. 277; *Waydell* v. *Luer*, 3 Denio, 410. *Contra*, *Early* v. *Burt*, 68 Iowa, 716: *Wild* v. *Dean*, 3 Allen, 579.

In the case of *Johnson* v. *Emerick*, 70 Mich. 215, Mr. Justice CHAMPLIN, speaking for the court, said:

"Such discharge from liability is based upon the express or implied assent of the creditor, upon a sufficient consideration; and a creditor, knowing of such relation, who goes on and deals with the other partners with reference to the debt, may well be held to have assented to the arrangement, and to have accepted the responsibility and promise of the partner assuming such debt. This consideration need not be a money consideration. It may be the obtaining of an additional security, better terms of payment, negotiable securities which the creditor may use in his business, or any other benefit, or it may be a loss

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of some right or disadvantage suffered by the surety through the act of the creditor."

In the present case it will be noted that the transfer of the firm property by defendant to Gill was not induced by any promise of plaintiff, but had occurred before any promise of release was made; nor does it appear, as before stated, that the defendant lost any rights; nor was any security taken or accepted by the plaintiff; nor does it appear that the time for the payment of the debt was extended.

Plaintiff relies upon *Walstrom* v. *Hopkins*, 103 Pa. St. 118, and *Eagle Manfg. Co.* v. *Jennings*, 29 Kan. 657 (44 Am. Rep. 668). In the latter case it was claimed that the plaintiff had due notice of the dissolution of the firm, and the assumption of the liabilities by Whitney, and that it accepted him for the payment of the bill of exchange. The court said:

"The dissolution of the partnership, the taking of all the partnership property, and the assumption of all partnership liabilities by Whitney, in no manner released defendant. The alleged promise of plaintiff was made after the dissolution, and not as an inducement to or consideration of it. The acceptance has never been paid. * * * No additional security of any kind was furnished. The acceptance was not destroyed and new paper given. The plaintiff received absolutely no consideration, and, even if it did promise that it would look to Whitney, such promise was entirely without consideration, and in no manner discharged the defendant."

In *Walstrom* v. *Hopkins* it was held that a promise by a creditor of a firm to release a partner who has retired from the firm, and to look to the continuing partner only for the payment of his debt, unless founded upon a legal consideration, is *nudum pactum*, and cannot be enforced.

The weight of authority favors the contention that the promise of the continuing partner may be a sufficient consideration to support the release of the outgoing partner. But, in the absence of such concurring or binding promise, we think no well-considered case can be found,

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holding that the mere agreement between the partners will of itself support the agreement of the creditor to release the outgoing partner. Such an agreement does not establish a privity between the continuing partner and the creditor, entitling him to sue such partner individually. It is only a private executory contract, intended to regulate the rights, duties, and obligations of the copartners between themselves, consequent upon a dissolution of the firm. *Wild* v. *Dean*, 3 Allen, 579. In the present case there was not only no extension of time, no acceptance of the paper of the individual partner, but the stipulation does not show an express agreement made to plaintiff by Gill to pay the debt. The finding is that Gill stated to plaintiff that he had agreed with Wickoff to pay all partnership indebtedness, and that to this the plaintiff replied, "All right; pay as fast as you can." It will be noted that this was not simultaneous with the release of Wickoff, nor did it in terms establish a privity between Gill and plaintiff as to the obligation of Gill to pay the debt individually.

We think the judgment should be affirmed.

The other Justices concurred.

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## WOODCOCK *v.* FIRST NATIONAL BANK OF NILES.

1. APPEAL—FRAUD.
   Upon a consideration of the testimony, *held*, that complainant had failed to establish his claim that certain stock, pledged as collateral to a note and mortgage, was fraudulently withheld from him upon the occasion of his taking an assignment of the mortgage.
2. ASSIGNMENT OF MORTGAGE—RESCISSION—ESTOPPEL.
   An assignee of a mortgage given by a corporation cannot rescind the assignment upon the ground that the mortgage was the outgrowth of an *ultra vires* transaction, where he was aware of the facts upon which such contention is based before he accepted the assignment.
3. CORPORATIONS—ULTRA VIRES—NEGOTIABLE PAPER.
   A note and mortgage given by a corporation cannot be defeated in the hands of a good-faith purchaser before dishonor who took the same as the result of negotiations with the officers of the corporation, on the ground that the transaction out of which the securities grew was *ultra vires*.

Appeal from Berrien; Buck, J., presiding. Submitted November 11, 1896. Decided May 28, 1897.

Bill by Edward F. Woodcock against the First National Bank of Niles, impleaded with Charles A. Johnson and others, to rescind the assignment of a mortgage. From a decree for complainant, defendant appeals. Reversed.

*E. L. Hamilton* and *Edward Bacon*, for complainant.

*M. L. Howell*, for defendant.

MONTGOMERY, J. In 1891 the Niles Gaslight Company was engaged, and had for some time been engaged, in furnishing light to the citizens of Niles. In April of that year the Niles Electric Company was organized. On the 12th of May the Niles Gaslight Company borrowed of the

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First National Bank $10,000, which it used in purchasing a controlling interest in the stock of the electric company. The money was not paid to the company, but the credit was transferred from the gaslight company to the electric company on the books of the bank. The loan was secured by a real-estate mortgage, covering the plant of the Niles Gaslight Company, and also by a pledge of the shares of stock in the electric company acquired by the gaslight company. The loan was also evidenced by a promissory note, signed by the secretary and president of the gaslight company. This note was payable in one year from date. In May, 1892, the bank, by its cashier, extended the time of payment for one year.

Charles A. Johnson was cashier of the First National Bank during this time, and was also a stockholder and an officer in the gaslight company. On the 16th of May, 1892, he sold his stock in the gaslight company, and ceased to be an officer. Complainant was cashier of the Citizens' National Bank, a rival institution. By the records of that bank, it appears that on the 23d of May, 1892, an application was made by the gaslight company for a loan, and the following resolution was adopted: "On motion of Mr. Dean, supported by Mr. Gage, a loan of $10,000, for four months, was agreed upon to the Niles Gaslight Company, upon a mortgage upon their plant." On the 27th of May, in place of making a new mortgage, an assignment in blank was made by the First National Bank, it not being known to the officers of the bank to whom the mortgage was to be assigned; and this, together with the note and pledge of stock, was delivered to Bascom Parker, president of the gaslight company, and Worth Landon, an attorney who had drawn the assignment, upon payment to the bank of the $10,000 secured by the mortgage. It appears that, at the time this transfer was made, two separate notes, each in the sum of $10,000, were delivered by the cashier to Parker. The reason for the existence of these two notes is a matter of dispute between the parties, and will be referred to here-

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after. One of these notes was signed by the secretary of the company only, while the other note was signed by both secretary and president of the gaslight company, and this was the note described in the mortgage. Parker did not deliver to complainant either the pledged stock or the note signed by both president and secretary, but delivered with the assignment the mortgage, and the note signed by the secretary.

The mortgage and note were not paid, and on the 22d of December, 1893, the complainant filed the bill of complaint in the present case, seeking to rescind the transaction by which he became the purchaser of this mortgage, having, on November 29, 1893, tendered a reassignment of the mortgage to the bank, together with the amount of interest which had been collected by him upon the same. The grounds upon which rescission was sought were two: That a fraud was committed in putting off upon him the mortgage accompanied by the note signed by the secretary alone, and not accompanied by the stock which was collateral to it, his claim being that his agreement with the gas company was that he (complainant) was to receive the same securities which the First National Bank had, and, in effect, that Johnson, cashier of the defendant bank, and Parker, conspired to deceive him, and put off upon him securities which were other and different than those which the bank held; and, *second*, that the purchase by the gas company of the electric light stock was unlawful, and that there was no consideration for this note, and that the gas company, or any member of the company, might avail themselves of that defense, and that a bill had been filed, apparently conceded, however, to be defective, by one of the stockholders in the gas company, for the purpose of annulling this transaction.

The circuit judge, before whom the case was tried, found with the complainant upon the question of fact, and determined that the charge of fraud had been sustained. We are not able to affirm this determination. The conclusion is based very largely upon the testimony

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of Bascom Parker, who, by his own showing, is not a very reliable witness. It is apparent, both by the testimony of Woodcock and Parker, that the negotiations between the gas company and complainant did not, in the first instance, include or relate to the pledged stock of the electric light company at all, and the resolution of the bank, above referred to, shows that the security offered, and which the bank was ready to accept, was to consist of a mortgage upon the plant of the gaslight company. Parker's version of the transaction is that, after an abstract had been secured and shown to the complainant, he was then told for the first time by complainant that he desired an assignment of the securities or mortgage held by the First National Bank, saying that what was good enough security for the First National Bank would be good enough for complainant or his bank. It is an important fact that not until after these negotiations had been entered upon, according to the theory of complainant, was Parker himself aware, as his testimony would show, that the electric light stock held by the gas company was pledged to the First National Bank. His claim is that he informed Johnson of the fact that the parties of whom he was to obtain the money wanted an assignment, which meant that that did not release the stock, and that Johnson thereupon took a blank note, filled it out, and had it executed by the secretary of the gaslight company, Mr. Landon, to be substituted in place of the note secured by the mortgage. He also testified that at this time he informed Johnson that the Citizens' Bank did not desire a new mortgage; that they wanted the one which he had assigned over to them, and in that event the stock would still be tied up, and Mr. Bacon and himself (Parker) would be unable to raise the money to pay to Johnson and the First National Bank the money that Parker personally owed them. The theory of defendant, on the other hand, as supported by the testimony of Johnson and of Landon, is that the note signed by the secretary was carried in the bank so that the bank ex-

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aminer would not be aware of the fact that the bank was carrying paper secured by real-estate mortgage. Both deny *in toto* the charge of conspiracy, and we think the version of defendant is established by the great weight of the testimony. Parker's own testimony, if believed, would implicate Johnson in a conspiracy, not only to deceive the complainant, but to wink at the embezzlement of the funds of the gaslight company by Parker, for the purpose of appropriating the money to the payment of his own debts, and this notwithstanding the fact that the company was still indebted to Johnson and to his bank. We choose not to credit the testimony of such a witness when opposed by that of reputable witnesses, and particularly in view of the fact that, when this loan was originally agreed upon, no security other than the mortgage on the plant was contemplated by either party to the transaction.

As to the contention that the mortgage was void because it was the outgrowth of an *ultra vires* transaction, it appears that complainant, at the time he took the assignment of this mortgage, was aware that the same was given to secure a loan that was made for the purchase of this electric light stock. It further appears that by no effective proceedings has the gaslight company ever repudiated this contract; and it may be added that if the complainant was not aware of an infirmity in these securities in the hands of the First National Bank, as the paper was not dishonored when received by complainant, and was negotiated by the officers of the gaslight company, the security could not be defeated in complainant's hands. *Wright* v. *Pipe Line Co.*, 101 Pa. St. 204 (47 Am. Rep. 701).

The decree of the court below, rescinding this transaction, will be reversed, with costs of both courts to the defendant.

The other Justices concurred.

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## HILTON v. DUMPHEY.

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1. TAXES—SALE OF LANDS—COLLATERAL ATTACK.

A tax sale to the State is not subject to collateral attack on the ground that the land was not offered for sale a second time before being bid in to the State, as required by section 62 of the tax law of 1889 (3 How. Stat. § 1170*g*1), where the owner of the land, although appearing in the proceeding in which the decree of sale was made, took no steps to set aside the sale within the time prescribed by section 66 for filing objections to confirmation.

2. SAME—DRAIN TAXES—HOW ENFORCED.

Under section 6, chap. 6, of the drain law of 1885 (3 How. Stat. § 1740*f*6), providing that taxes assessed under such act shall be collected in the same manner as State and other general taxes, lands delinquent for drain taxes may be bid off in the name of the State, in a proper case, in accordance with the provisions of the general tax law, notwithstanding lands so bid to it are, by the terms of such law, held "for the use of the State, county, and town, in proportion to the amount due each," neither of which bodies has any pecuniary interest in drain taxes.

Error to Monroe; Kinne, J. Submitted April 13, 1897. Decided May 28, 1897.

Ejectment by Joseph S. Hilton against Azuba Dumphey. From a judgment for defendant, plaintiff brings error. Reversed.

*Randall & Corbin*, for appellant.

*Landon & Lockwood* (*I. R. Grosvenor*, of counsel), for appellee.

LONG, C. J. Action of ejectment. Case tried before the court without a jury, who made findings of fact and law, and entered judgment in favor of defendant. De-



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fendant is in possession of the property. Plaintiff claims title under tax deed.

It appears that in 1889 a petition was presented to the township drain commissioner to widen and deepen what is called "Jones' Drain." Such proceedings were had that a tax amounting to $40.02 was assessed upon defendant's land for the construction of the drain. All the other taxes of this year were paid, and the land was returned delinquent for this drain tax. On April 15, 1892, a petition, filed in the circuit court of Monroe county, in chancery, for a decree for the sale of lands returned delinquent for taxes, came on to be heard, and a decree was entered, adjudging, among other things, that this land be sold to pay said tax. On the 2d day of May, 1892, the premises were bid off to the State for the sum of $56.92, and on the 15th of May, 1893, the county treasurer, pursuant to notice that a sale would be made of all lands previously bid in by the State, struck off and sold them and the bid of the State to Cyrus W. Pettit, who afterwards conveyed to the plaintiff.

It is defendant's contention:

1. That there is no authority in the tax law empowering the county treasurer to bid to the State lands for a drain tax.

2. That, even if the State could bid in the land, there is no evidence of a lawful sale.

The sale was made under Act No. 195, Pub. Acts 1889. Section 62 of that act provides:

"If any parcel of land cannot be sold for taxes, interest, and charges, such parcel shall be passed over for the time being, and shall on the succeeding day, or before the close of the sale, be reoffered; and if on such second offer, or during such sale, the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same in the name of the State, for the use of the State, county, and town, in proportion to the taxes, interest, and charges due each." 3 How. Stat. § 1170*g*1.

The report of the county treasurer, as found by the court below, shows that he "did keep such sale open

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until each and every parcel of land mentioned in said tax record and described therein had been publicly offered for sale, and that the parcels of land described in said record opposite to which appears the word 'State' did not receive any bids," and that, in pursuance of the statute, he "did bid them off in the name and in behalf of the State of Michigan, for the sums set opposite to each respective parcel so marked." It is contended by the defendant that there is no showing by the report of the county treasurer that he offered this parcel of land for sale, and for want of bidders passed it over to the succeeding day, or before the close of the sale reoffered it for sale; and that, therefore, there was no such compliance with the provisions of the statute as to make the sale a valid one.

The report does not affirmatively show that there was any second offering, as directed by the statute; but section 66 of the act provides that the report of sale shall be filed with the clerk of the court, etc., and "all sales shall stand confirmed, subject to the right of redemption provided for in section 64, unless objections thereto are filed within eight days after the time limited for filing such report, without the entry of any order of further notice." This statute, therefore, makes it unnecessary to enter any order of confirmation. The sale stands confirmed upon filing the report, unless objections are filed within eight days, etc. The tax record, we think, fairly discloses that defendant appeared in the proceedings on which the decree was taken, as it is stated that her objections were overruled. Can she now, without having moved to set aside the sale within the eight days provided by the statute, and in a collateral proceeding, take advantage of the irregularity in making the sale? The defect is not jurisdictional. If it were, it would be subject to very different considerations. If defendant had applied to the court in that proceeding seasonably, there can be no doubt but that the sale would have been set aside. This she did not do. She cannot raise the question in this collateral

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proceeding. *Ruggles* v. *First Nat. Bank*, 43 Mich. 196; Van Fleet, Coll. Attack, §§ 787, 788.

Under the first point made by counsel, it is contended that, inasmuch as by the provisions of section 62 of the general tax law the county treasurer "shall bid off the same in the name of the State, for the use of the State, county, and town, in proportion to the taxes, interest, and charges due each," it is apparent that this statute has no application to the sale of lands for drain taxes, as neither the State, county, nor town has any interest in the moneys arising from such sales; that such taxes are purely neighborhood affairs, under *Dawson* v. *Township of Aurelius*, 49 Mich. 479; *Camp* v. *Township of Algansee*, 50 Mich. 4; *Anderson* v. *Hill*, 54 Mich. 485; *Alcona Co.* v. *White*, Id. 505. It is true that these drain matters are not regarded as matters in which the State, county, or township has a pecuniary interest; but the drain law provides that such taxes are to be collected "in the same manner as State and other general taxes are collected," etc. This act was passed in 1885, and, so far as any provision of the drain law is concerned, has not been changed. There is no provision for the sale of lands for the nonpayment of drain taxes other than that found in the general tax laws. It must be presumed that the legislature intended that some method should be provided for selling lands assessed for drain taxes. Such tax is made a perpetual lien upon the lands assessed, and we think the general tax laws were intended to cover sales of this kind. While the State has no pecuniary interest in the matter, yet the legislature, by the act, made the county treasurer the agent of the State for the purpose of making sales of lands for delinquent taxes, and, as such agent, he is, we think, clothed with authority to sell lands for drain taxes, and therefore that the bid to the State in this case was authorized by the general tax law. The land was struck off to the State, and the next year reoffered, and sold to Mr. Pettit.

The court was in error in concluding that the judgment

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should be in favor of defendant. Under the facts found, the judgment should have been for the plaintiff. Such judgment will be entered here, with costs of both courts in favor of plaintiff.

The other Justices concurred.

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AUDITOR GENERAL *v.* HUTCHINSON.

1. TAXES—COLLECTION BY SALE OF LANDS—IRREGULARITIES.
Under the curative provision of the tax law of 1893 (Act No. 206, § 99), the fact that a city assessor delivered the original tax roll to the treasurer, instead of a copy, as provided by the charter, and that the treasurer failed to verify his return of uncollected taxes within the specified time, will not defeat a proceeding by the auditor general to enforce the tax by a sale of the land.

2. SAME—PROCEEDINGS OF CITY COUNCIL—PRESUMPTION.
The courts will not assume that the common council of a city failed to make an estimate of the general expenditures, as required by the charter, before levying the city taxes, because no entry thereof is made upon the records of the council, where there is no express provision requiring such entry to be made.

3. MUNICIPAL CORPORATIONS — SPECIAL MEETING OF COUNCIL — VALIDITY.
Action taken at a special meeting of a city council is not invalid for want of proof of due notice of the meeting, where it appears from the record of the vote taken that all of the members were present.

4. NEWSPAPERS—NOTICE—SUFFICIENCY OF PUBLICATION.
A charter provision requiring a notice to be published in each of the public newspapers printed in the city does not include newspapers printed in foreign languages.[1]

[1] Some other authorities on the publication of official notices in foreign languages are found in a note to *State* v. *Mayor of Orange*, (N. J.) 14 L. R. A. 64.

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Appeal from Muskegon; Russell, J. Submitted April 9, 1897. Decided May 28. 1897.

Petition by Stanley W. Turner, auditor general, for the sale of lands delinquent for taxes. James Hutchinson and others filed objections. There was a decree for contestants, and petitioner appeals. Reversed.

*Fred A. Maynard*, Attorney General, and *H. L. Delano*, City Attorney (*Bunker & Carpenter* of counsel), for petitioner.

*Arthur Jones*, *Smith*, *Nims*, *Hoyt & Erwin*, and *P. W. Niskern*, for contestants.

GRANT, J. This is the usual petition by the auditor general for the sale of delinquent tax lands. The contestants filed 22 objections against the taxes. The assessment was held void and the petition dismissed as to the contestants, for two reasons, namely:

(1) The assessor did not make or cause to be made the assessment rolls and the tax rolls of the city of Muskegon as required by the charter of the city.

(2) The treasurer did not, within the time and in the manner required by the statute and the charter of said city, return the lands to the assessor of said city as delinquent for unpaid city, school, library, one mill, and schoolhouse taxes, and verify such return in the manner provided by law.

The tax involved amounts to about $9,000.

Section 99 of the tax law of 1893 (Act No. 206), under which this assessment was made, is as follows:

"No tax assessed upon any property, or sale therefor, shall be held invalid by any court of this State on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, * * * or on account of any other irregularity, informality, or omission, or want of any matter of form or substance in any proceeding that does not prejudice the property rights of the person whose property is taxed; and all proceed-

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ings in assessing and levying taxes, and in the sale and conveyance therefor, shall be presumed by all the courts of this State to be legal until the contrary is affirmatively shown."

1. In preparing the assessment and tax rolls, the assessor first listed and valued this taxable property on a single roll, which was submitted to the board of review, and was by that board reviewed and corrected. The assessor then made two copies, which were also submitted to the board of review, and were approved and adopted by the board. On one of these copies he spread the city and school taxes, and attached to it his warrant, and then delivered the roll and warrant to the treasurer, whose duty it was to collect the taxes. In November the treasurer made statements of the uncollected taxes, real and personal, on that roll, and delivered them, with the roll itself, to the assessor. He failed to verify the statements until December, 1894, when he swore to an affidavit, and attached it to the statements. The provisions of the city charter covering the points raised are in sections 6, 10, 11, and 12 of title 10 of the charter (Act No. 304, Local Acts 1889). It is unnecessary to quote them. The defects consist in this:

(1) That the assessor attached his warrant to the original tax roll, and delivered it to the treasurer, instead of delivering a copy, as the charter required.

(2) That the treasurer, in making his return, did not verify his statements of uncollected city and school taxes.

No claim is made, either in the objections filed to the petition, or in the testimony, or in the arguments of counsel, that the taxes are unjust or excessive. Contestants are not before the court offering to bear their just proportion of the public burden. On the contrary, they seek to avoid the payment entirely because officers upon whom is imposed the duty to perform certain acts have not performed them in strict accordance with the requirements of the law. It is too clear to require extended argument that the fact that the collector used the original tax roll

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instead of a copy, and the failure to verify a statement at the time required by the law, do not affect the justice of the tax, nor prejudice the property rights of these contestants. If these defects are not covered and cured by the curative statute above cited, it is difficult to note any defect which would be cured by it.

The learned counsel for the petitioner have presented able arguments contrasting the position taken by courts of law and of equity under the earlier tax laws. We have not time to discuss the interesting subject. It is sufficient to say that in cases at law the statutes were, as a rule, so strictly construed that it was generally understood, not only by lawyers, but by laymen, that the presumption was against the validity of a tax title. It is noticeable also that when the original owner filed his bill in equity to remove a cloud from title, or to restrain the sale of his land, the courts acted upon the wholesome maxim, "He who asks equity must do equity," and, as a condition precedent to release, required him to pay his share of the public burden admitted to be just. This principle appears in the following cases: *Merrill* v. *Humphrey*, 24 Mich. 170; *Albany & Boston Min. Co.* v. *Auditor General*, 37 Mich. 391; *Burt* v. *Wadsworth*, 39 Mich. 126; *Connors* v. *City of Detroit*, 41 Mich. 128. Other cases to the same effect might be cited from both this and other courts. Undoubtedly, the legislature, in view of these decisions, intended to confer upon courts of equity jurisdiction to decree a sale of delinquent lands, in which proceeding a taxpayer would be permitted to appear and defend, not upon technical grounds, or upon a mere neglect of official duty which did not affect the justice of the tax or prejudice his property rights, but in which he might appear and defend for defects which were jurisdictional, and which prejudiced him. Under the old law, the prudent and honest men paid their taxes; the careless and dishonest did not. Under that system the prudent and honorable men paid more than their fair share of the public burdens. The present law was aimed

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to cure this evil, and should be liberally construed. We are of the opinion that the court was in error in holding that these defects are not cured by the statute. *Hamilton & Merryman Co.* v. *Township of L'Anse*, 107 Mich. 419; *Auditor General* v. *Longyear*, 110 Mich. 223; *Auditor General* v. *Jenkinson*, 90 Mich. 523.

2. It is urged as a fatal defect that the records of the common council do not show that estimates of the general expenditures were made as the charter requires. The only evidence that such estimates were not made is the fact that there was no entry of them upon the records. There is no express provision of the charter requiring such entry to be made. These estimates are usually made by a committee, and courts will not assume that no such estimates were made and included in the annual appropriation budget from the fact that no entry thereof is made upon the record.

3. This action of the council was taken at a special meeting, and there is no record of serving notice upon all the members of the council. The roll call, as appears by the record, discloses one absent member. He was undoubtedly absent from the council chamber when the roll was called, but the record shows that he was present, and voted on the resolution. The objection is therefore without force.

4. The charter requires that notice of the meeting of the board of review shall be given 10 days previous to this meeting by publication in each of the public newspapers printed in the city. A Swedish newspaper was printed in the city, and notice was published in it, but not 10 days prior to the meeting. This provision does not mean newspapers printed in foreign languages. The English language is the recognized language of this country, and whenever the law refers to publication in the newspapers it means those published in the language of the country. In *Graham* v. *King*, 50 Mo. 23 (11 Am. Rep. 401), it was held that, "when notices are to be published in a paper, an English paper is always intended

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unless it is expressed to be otherwise." This case was approved in *Schaale* v. *Wasey*, 70 Mich. 419, where notice published in English, but in a newspaper published in a foreign language, was held void. If the legislature desires to provide for publications in foreign languages, it may do so by express enactment. There was, therefore, no necessity for publishing it in this paper. But, if there were, there is no evidence that the contestants in this case were prejudiced in their property rights by this failure.

It is unnecessary to discuss the other objections raised. They are all covered by the statute as above construed.

Decree is reversed, and the case remanded for further proceedings.

The other Justices concurred.

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## FRANCIS *v.* HURD.[1]

1. PAYMENTS—DURESS—WHAT CONSTITUTES.

   Payment made by a mother to the owner of goods taken by the former's daughter cannot be recovered back on the ground of duress, although the owner was pressing for payment, and there was a dispute as to the value of the goods taken, where there was no threat by the owner of a prosecution of the daughter for a criminal offense, and the payment was voluntarily arranged for on one day, and the amount paid on the next after consulting a lawyer.[2]

2. SAME—FRAUD—QUESTION FOR JURY.

   But where the circumstances are such as to justify an inference of bad faith on the part of the owner, whether a recovery should be had on the ground of fraud and overreaching is a question for the jury, under proper instructions.

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[1] Rehearing denied September 14, 1897.

[2] The effect of duress by threats to prosecute a relative is considered in a note to *City Nat. Bank* v. *Kusworm*, (Wis.) 26 L. R. A. 48.

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Error to Ingham; Person, J. Submitted February 5, 1897. Decided May 28, 1897.

*Assumpsit* by Ann Francis against Daniel C. Hurd to recover money alleged to have been obtained by fraud and duress. From a judgment for plaintiff, defendant brings error. Reversed.

*Harris E. Thomas* (*Cahill & Ostrander*, of counsel), for appellant.

*Q. A. Smith* and *M. V. & R. A. Montgomery*, for appellee.

LONG, C. J. This action was brought to recover the sum of $500, claimed to have been paid by plaintiff to the defendant under duress. The declaration avers the circumstances under which the money was paid substantially as follows:

1. That the plaintiff is the mother of Ella Francis, now Mrs. Urch, a young lady about 28 years of age, who had been in the employ of defendant in his store as a clerk and saleswoman.
2. That on July 14, 1892, defendant falsely and fraudulently claimed and pretended to plaintiff that her daughter had been guilty of stealing, taking, and carrying away defendant's goods.
3. That her daughter was about to be and would be arrested on complaint of defendant for such larceny unless plaintiff paid defendant $500.
4. That plaintiff was so wrought upon and agitated by such unlawful claim and pretense that she paid the $500.

It appears that the plaintiff's daughter, at the time of the payment of the money, was a woman about 28 years of age. She commenced work for defendant as a clerk in 1887, and had become principal clerk in the store. Her parents lived on a farm near Lansing, and were customers of defendant, who dealt in dry goods, clothing, boots, and shoes, and had so dealt for some 18 years, in North Lansing. When Miss Francis entered defendant's employ, there was a dressmaking establishment in the same build-

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ing over defendant's store. Defendant removed his stock to another building, and soon after the dressmaking establishment was removed over the new location. The dressmaking business was conducted by Miss Towne, a friend of plaintiff's daughter, and with whom the daughter much of the time roomed and boarded. She was rooming and boarding there in July, 1892. Miss Francis commenced work for $2.50 per week, but her pay was increased from time to time until, in July, 1892, she was receiving $7.50 per week.

As early as 1889 defendant was told by one of the clerks that he believed Miss Francis was taking money from the store. Later another clerk told him the same thing. Defendant then talked with Miss Francis about it. She denied the charge, and defendant says he then believed the clerks were mistaken. In May, 1892, defendant overheard a lady clerk talking about the dresses Miss Francis was having made (she was about to be married), and that she would not need to buy any for a long time. Defendant claims that he thought this strange, as he was owing her some $650 on her wages, and she seemed to be buying nothing at the store. On July 12, 1892, one of the clerks said to the defendant that he could stand it no longer, that he had seen Miss Francis taking goods out of the store when the defendant was absent, and that she had taken a lot of shoes that day. On the next day the defendant took a search warrant, and, with an officer, went in the evening to the dressmaking rooms of Miss Towne over the store, where they found a large quantity of goods in packages claimed by defendant to be his. They then went to the house of Miss Towne, where she and Miss Francis were. They denied that any of defendant's goods were there, but, upon search being made in the rooms, they found other goods claimed by defendant. Some of the goods found at the house were claimed by Miss Francis, and were given up to her. The balance of the goods were all turned over to the defendant. Later Miss Francis and Miss Towne asserted title to a few of

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the articles taken, and all the rest were put back into the stock of the defendant, and retained by him. The articles taken on the search warrant are too numerous to mention. They consisted of dress goods, mitts, gloves, shoes, napkins, towels, sheeting, table linen, handkerchiefs, laces, veiling, ribbons, etc., amounting at retail prices to upwards of $600.

On the trial Miss Francis was called as a witness, and acknowledged that she took these goods from the store of the defendant. The reason given by her for taking them was that she intended to return some; that she had heard Mr. Hurd was in debt, and she was in doubt about getting her pay, but when he settled with her she intended to allow him for the goods. She was asked if she had kept any account of the goods, and said she had not, only in her head. Being asked how much she figured the goods in her head, she said about $75; asked how long before that she conceived the idea of taking the goods for her pay, she said, "Some seven or eight weeks." She had been taking goods for some two years prior to this.

It appears that on the morning of July 14th the officer went to the farm of Mr. Francis, and told him about the occurrence. Both parents came to Lansing. Mr. Francis went to see defendant, and Mrs. Francis went to see her daughter at the home of Miss Towne, talked with her there, and went to defendant's store, where she found her husband and defendant in conversation. Defendant told of the goods he had found, and stated his belief that Miss Francis had been taking goods for a long time, and that he could not tell how much he had lost. There was no talk of a settlement at this interview. Plaintiff and her husband then went to see their daughter, and talked the matter over with her. They also talked with the officer and Miss Towne. They then returned to the defendant's store, and at this interview there was talk of a settlement. Plaintiff was asked, on the trial:

"How did you come to make a settlement, and what was there to it?

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"*A.* Well, Mr. Francis asked him what was the least that he could settle for, and he said $2,000 and her wages, and make up B. & L. money to $500, and that was the least, and that was less than half of what he expected to get. * * * Mr. Francis said that he could pay no such sum, and that he would have to take her body,—she was out from under his reach; and he said that he would have to have her arrested, or something of that kind,—that would only take her body,—and that was the last that he said. Mr. Francis then said, 'Come, we are going home.' But I did not go. I stayed there, I presume, two minutes, and Mr. Hurd came up and said, 'You can settle it.' He said he would settle it for $500 and her wages. * * * I said, 'I will give it.' * * * The next day we came to town. Mr. Francis did not go to see Mr. Hurd again. I did, after I got the money. I borrowed the money myself of Mr. Wilbur,—gave my note for it. * * * Then I went and got a receipt made out, and took it to Mr. Hurd, and he signed it, to the amount that he was owing Ella and the amount that I paid him. I paid him the money. * * * The receipt was drawn at Mr. Twaits' office. No one went with me to get the receipt drawn. My husband did not go with me."

According to the testimony of the plaintiff and her husband, nothing was said by defendant about arresting their daughter at any time while the settlement was being made. But plaintiff contends that, during the night when the goods were taken, the defendant was at the house of Miss Towne with the officer nearly all night, urging Miss Francis to go out to her father that night and have it settled up. Plaintiff, however, does not claim that her daughter told her of any threat of arrest. She had seen the goods found by Mr. Hurd. Her daughter had told her that she had taken goods which she had neither paid for nor charged on the books, and she had talked with her daughter about making a settlement. She knew no complaint had been made, and she understood she had authority to make a settlement for her daughter, and allow Mr. Hurd to keep her wages in settlement.

It is difficult to read this record and come to any other

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conclusion than that the defendant, under the circumstances shown, had reason to believe that Miss Francis had intended to steal these goods. The plaintiff, however, testified that she did not believe, either at the time of the settlement or at any other time, that her daughter had stolen. The declaration avers that the duress arose from a false and fraudulent claim that Miss Francis had been stealing, and would be arrested and prosecuted for the larceny unless settlement was made. Under the undisputed facts in this case, it is apparent that the claim made by the defendant that Miss Francis had been stealing goods was not fraudulent. He had good reason to believe, from all the facts and circumstances, that such was the case; and there is no proof of any threat to arrest or prosecute.

The fact that Mr. Hurd had good reason to believe that the goods were stolen by Miss Francis is better shown by reference to some of the articles taken, and the time when taken, as shown by the testimony introduced by defendant. There were garments of woolen underwear found, which Miss Francis says she took for her mother, which were taken in the spring, and which lay in the shop of Miss Towne for weeks. There were two infants' dresses found, which Miss Francis says were sent up to Miss Towne's room by mistake, in a box supposed to be empty. They were wrapped by Miss Towne in a package, the name of Miss Francis written on them, and thrown upon a shelf in a closet. The store where they belonged was just below. There was cottonade for clothing, which Miss Francis says she took for her father, which had lain for weeks in Miss Towne's room. There was heavy barege veiling, taken to be made up some time,—taken in the summer. There were shoes at the house of Miss Towne, which had been taken there, as claimed, to be tried on by Miss Towne, which had remained there for days; and there were four pairs of shoes found in Miss Towne's shop. In all, seven pairs of ladies' and one pair of men's shoes were recovered. Testimony

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is given in the case by the clerks of defendant, whose suspicions were aroused as to the conduct of Miss Francis, and to which defendant's attention had before been called. She frequently—perhaps once in two or three weeks—got small silver changed into bills by the bookkeeper in the store. This covered a period of two or three years. She also changed silver into five and ten dollar bills at the stores of other merchants near by at different times. The testimony also shows that she carried on a traffic in goods with girls in the shop of Miss Towne, selling them and taking money for them, frequently taking goods from the store, not paying for or charging them. These things were noticed by the other clerks. When asked at the house of Miss Towne, on the night the goods were taken, if any goods were there belonging to Mr. Hurd, she denied there were any such, and yet large quantities were so found; and finally, when pressed for the reason for taking them, she asserts that she thought she would not get her pay, and she intended to account for them in a settlement with Mr. Hurd. Something over $600 worth of goods were taken. She kept the account in her head, and estimated the value at $75.

We think the admitted facts negative any duress. Duress implies a constraint which overcomes the will. While this may be brought about by threats of prosecution for a criminal offense, yet in this case we find no such threat; and the mere fact that the defendant was pressing payment of a debt which he believed to be his due can in no sense be held illegal. It was a matter of dispute as to how much the debt was,—just how much was the value of the goods the daughter had taken during those years. The plaintiff was authorized by her to make settlement. She made it after a full and fair understanding as to what she was settling for. There was no haste about it. She arranged it voluntarily one day, and paid the amount the next. She went to a lawyer, and had the receipt drawn, which fully covered the settlement. It is said that, the defendant having at-

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tempted to impress upon the plaintiff the fact that Miss Francis had confessed her guilt to him, this operated upon the mind of plaintiff, and influenced her in making the settlement. But the plaintiff testifies that, at the time she made the settlement, she did not believe her daughter was guilty of having stolen anything, or was guilty of the crime charged. It is not apparent, from these facts, how the plaintiff was deceived, nor how, by such deception, she was induced to make the settlement.

At the close of the testimony, defendant's counsel asked the court to charge that plaintiff could not recover. This was refused. While there may be some evidence in the case which warranted the court in refusing to instruct a verdict for the defendant, yet, under the facts shown and the circumstances surrounding the case, we think the court was in error in refusing certain other requests to charge. No tribunal would have the right to disturb the compromise and settlement, except upon evidence of fraud or unconscionable advantage, as no threats to institute criminal proceedings are shown; so that the real question which should have gone to the jury was whether the defendant was acting in good faith, and making a demand of payment for goods and property which he actually believed he had lost. In view of this, the following requests should have been given, or the substance of them embodied in the general charge:

"5. It is admitted by Mrs. Ella Urch [Miss Francis] that she had, from time to time before the 14th day of July, 1892, been taking goods belonging to Mr. Hurd from his store without paying for them, and without charging them to herself, unknown to Mr. Hurd. Under these circumstances, she must be held chargeable with the reasonable suspicion arising from those facts. If Mr. Hurd, learning of these facts from his clerks, suspected or believed that Miss Francis was stealing goods, the fact whether or not she intended to commit the crime of larceny is not important. In other words, Mr. Hurd had the right to act upon the information received by him upon this subject, and, after finding the goods in the rooms of



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Miss Towne and at the house of Miss Towne, he had the right to suspect and believe that other goods had been taken under similar circumstances. He was not obliged to accept the statement of Ella Francis that she did not commit the crime of larceny, and his conduct thereafter is not to be measured or determined by the actual guilt or innocence of Miss Francis.

"6. If the defendant claimed to the plaintiff that her daughter had been stealing goods and money from him, and the plaintiff, after hearing his statement of the facts, and her claim that she had never stolen anything from the defendant, nevertheless paid to defendant the sum of $500 in settlement of the defendant's claim, she cannot recover the money so paid.

"7. If Ella Francis did take and carry away the goods of the defendant, intending to steal them, then the defendant did not in that regard make any false charge to the plaintiff. If plaintiff's daughter took goods of defendant, and did not in fact intend to steal them, but to some time pay for them, or have them charged to herself, she is responsible for the belief likely to be excited by her acts in this direction. And if the plaintiff, after hearing the statement of Mr. Hurd, and also that of her daughter, the claim of guilt on the one hand and of innocence on the other having been made to her, determined to pay and did pay the defendant money, she cannot recover.

"8. If the statements made by defendant to plaintiff were such as the conduct of Ella Francis, the finding of the goods, and the information received by defendant from his clerks rendered reasonable, and plaintiff, hearing them and also hearing the story of her daughter, herself believed that her daughter might have taken goods or money not recovered, and that it was proper to pay to Mr. Hurd the sum of $500, she cannot recover, even if her daughter did not in fact intend to steal the goods.

"9. If the daughter of plaintiff had stolen goods from defendant, or if she had taken them and not paid for them or accounted for them, but without intending to steal them, in either event defendant was entitled to be paid for goods so taken. If the circumstances were such that, whether the goods were or were not stolen, it was likely or probable that other goods than those recovered had been taken, Mr. Hurd, acting upon all the facts as they appeared, had the right to demand pay for such goods. If plaintiff, after hearing the facts or claimed

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facts, both from Mr. Hurd and from her daughter, paid to the defendant the money, she cannot recover.

"10. If the jury should reach the conclusion that Ella Francis did not intend to steal the goods, that would not necessarily be decisive of the case. The plaintiff's daughter admittedly took some goods out of the store without paying for them or giving any account of them to Mr. Hurd. Under such circumstances, Mr. Hurd was not bound to take her statement as to the quantity or value of the goods so taken. He had a right to assume that others had been so taken, and to make his own estimate of them. And if the plaintiff, after talking with defendant and her daughter, consented to pay $500 in settlement of defendant's claim, she cannot recover it."

"13. The undisputed testimony in this case shows that for several years prior to the 14th day of July, 1892, Ella Francis, now Mrs. Urch, had been employed as a clerk in defendant's store at North Lansing; that, for several months just prior to July 14th, she had been taking goods out of defendant's store that did not belong to her; that she neither paid for such goods, nor gave an account of them, nor had them charged to her upon defendant's books; and that the fact that she had taken them, and the amount she had taken, was not known to Mr. Hurd until he was informed by his clerks, and the goods or some of them were found by the officer having the search warrant for that purpose. Under such circumstances, Mr. Hurd was not bound to accept Mrs. Urch's statement as to the amount or value of the goods so taken by her. He had a right to assume, for the purpose of settlement, that she had taken other goods besides those found, and to put his own estimate upon the value of such goods. And if the plaintiff, under the circumstances proved in this case, there being no evidence of duress or of constraint put upon her, saw fit to pay the sum which defendant said he was willing to accept in settlement, she cannot recover it back in this suit.

"14. If Mr. Hurd, falsely and without pretense of right, represented to Mrs. Francis that her daughter had been wrongfully taking goods out of his store, when in fact she had not been, and by such false pretense induced Mrs. Francis to pay him $500, she may sue and recover it of him in this action. But if her daughter had, as a matter of fact, been taking goods out of defendant's store that did not belong to her, and without the knowledge of Mr.

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Hurd, and if he had no means of knowing the extent or value of the goods thus taken, he had a right, in case the plaintiff proposed a settlement for such goods, to put his own estimate on his loss, and the plaintiff had the right to pay it or not, as she chose; but, if she paid money under such circumstances, she cannot recover it in this suit.

"15. If plaintiff voluntarily paid defendant the money she claims to have paid, she cannot recover it in this suit, unless the defendant deceived the plaintiff, and induced her to pay the money by false and fraudulent representations as to the facts.

"16. If plaintiff's daughter had been taking goods out of the defendant's store from time to time without defendant's knowledge, under such circumstances as might reasonably lead the defendant to believe she had stolen them, and if this wrongful conduct had been going on for so long a time that defendant did not have the means of knowing the extent or value of the goods so taken, he had a right to estimate such loss at such sum as he believed would indemnify him; and any statement made by him, to the effect that his loss might be one, two, three, or six thousand dollars, if accompanied by the further statement, made in good faith, that he did not know and had no means of finding out just how much his loss was, would not, under such circumstances, be false and fraudulent. And if the plaintiff, knowing these facts, and that defendant's claim was in the nature of an estimate, and did not purport to be an accurate statement of his loss, voluntarily paid the money, she cannot recover it.

"17. The plaintiff had a right to settle with the defendant, and to pay him for any goods wrongfully taken by her daughter out of his store; and, if the exact quantity and value of the goods so taken was not known, the parties had a right to agree upon a sum that should be paid and accepted in settlement. If they did agree upon such settlement, and the money was paid in pursuance to it, it is binding upon both parties, and the plaintiff cannot recover."

The judgment must be reversed, and a new trial ordered.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred with LONG, C. J.

GRANT, J. I think the court should have directed a verdict for the defendant.

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## LONG v. EVENING NEWS ASSOCIATION.

1. FRAUDULENT CONVEYANCES—EVIDENCE—LIBEL—MALICE.
   Evidence that a demand for the retraction of a libelous article was not complied with by the publishers is inadmissible in garnishment proceedings based upon the alleged fraudulent transfer of the newspaper assets pending an appeal from a judgment for the libel, since the inference of malice to be drawn therefrom would go no further than the judgment itself towards showing a motive for a fraudulent disposition of the property.

2. TRIAL—ARGUMENT OF COUNSEL—PREJUDICIAL REMARKS.
   That one is the managing director of a newspaper will not justify counsel in referring to him, in garnishment proceedings for the amount of a judgment against the paper for libel, as the man "who sits in his sanctum, where nobody can see the hand that writes, nobody can see the brain that works, and writes sensational articles against citizens of his own town, as he wrote the article on which this judgment was rendered," where the fact that such person had nothing to do with the publication of the libelous article is established by the court's having directed verdict in his favor in the original suit.

3. FRAUDULENT CONVEYANCES—CONSIDERATION.
   The fact that the tangible assets of a newspaper, whose transfer of all of its assets to another paper in payment of a debt is attacked as fraudulent by a judgment creditor, did not exceed in value the amount of the indebtedness, will not necessarily relieve the assignee from liability in garnishment, where no account was taken of intangible assets. GRANT, J., and LONG, C. J., dissenting.

4. SAME—INTANGIBLE ASSETS—PERSONAL FRANCHISE—GOOD WILL.
   That a franchise of the assignor in the Associated Press was transferable only with the consent of the association, and that its business had for several years been conducted at a loss, is insufficient to show that the franchise and good will were properly disregarded in the transaction as of no value; it being for the jury to determine, upon proper evidence, whether their inclusion without compensation was in fraud of creditors. GRANT, J., and LONG, C. J., dissenting.

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Error to Wayne; Aldrich, J., presiding. Submitted February 11, 1897. Decided May 28, 1897.

Garnishment proceedings by John H. Long against the Evening News Association, as garnishee of the Tribune Printing Company. From a judgment for plaintiff, the garnishee defendant brings error. Reversed.

*Elliott G. Stevenson*, for appellant.

*Levi T. Griffin* and *C. E. Warner*, for appellee.

GRANT, J. Plaintiff recovered a judgment in a libel suit against the defendant Tribune Printing Company, December 18, 1894. The case was affirmed in this court December 3, 1895. See 107 Mich. 207. December 9, 1895, execution was issued and returned unsatisfied. January 21, 1896, plaintiff instituted this proceeding in garnishment against the Evening News Association, which filed a disclosure that it had no property, money, or effects in its hands belonging to the Tribune Company. In February and March, 1895 the Tribune Company had sold and conveyed to the News Association all its property and assets. The theory of this suit is that these conveyances were fraudulent as to the creditors of the Tribune Company, and that therefore the News Association held the property in trust for said creditors. Plaintiff recovered verdict and judgment. Such further facts as are essential will be stated in connection with the points discussed.

1. One of the counsel for plaintiff, in his argument, used the following language:

"Mr. Scripps supposed he could sit in the Tribune room or the Evening News room and blacken the character of a respectable citizen. You find him sitting in his sanctum, where nobody can see the hand that writes, nobody can see the brain that works, and there he scribbles and writes sensational articles against citizens of his own town, as he wrote the article on which this judgment was rendered. Now, gentlemen of the jury, Mr. Scripps

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has set out—*First*, as the evidence shows, to libel John H. Long; *second*, to procure able counsel, as he testifies to himself, to defeat John H. Long upon the trial of the case. In that he failed to succeed. And it appears, on a trial by jury and by the highest court in the State, it was adjudicated that James E. Scripps did libel John H. Long, and he ought to pay the amount of judgment for it. Mr. Scripps says, 'I will go before another jury and another judge, and I will get another counsel, and I will yet defeat John H. Long so far as his ability to secure any payment of the debt is concerned.' James E. Scripps, known in this community as a large-moneyed man, now comes into this court to defeat a policeman who worked for two or three dollars a day, and defeat him against a judgment which he had obtained."

In view of the fact that Mr. Scripps had nothing to do with the publication of the libelous matter, and that for that reason the court, in the libel suit, directed a verdict in his favor, the impropriety and injustice of the language are apparent. Its natural tendency was to greatly prejudice the jury. Its use cannot be defended upon the ground that Mr. Scripps owned most of the stock of the company, and was the managing director, and that therefore "theoretically it was his hand that wrote" and "his brain that worked."

2. Counsel were permitted to show that plaintiff had demanded a retraction of the article before he brought his libel suit, and that no retraction was made. Counsel seek to defend the admission of this evidence under the liberal rule applicable to cases where fraud is charged, and they insist that in some manner it tended to show a motive for the transfer. We think that this testimony was incompetent and immaterial. The record contains no evidence tending to show that the sales to the News Association were made with any reference to the plaintiff's suit, which was then pending in this court. If plaintiff has a right of action against the defendant, it is because the law attaches a liability from the undisputed facts, and not because of any intent to defraud; or, to state

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the proposition otherwise, the transaction is a fraud in law, but not in intent.

3. James H. Stone, a former publisher of the Tribune, was called as a witness for plaintiff. He testified that, when he was connected with the Tribune Company, it had the franchise of the Western Associated Press, as did also the Free Press; that in January, 1891, when he sold out the establishment to Mr. Scripps, the circulation of the daily was 12,000 to 13,000, and of the weekly somewhat in excess of that; that the sale carried with it the entire property and "good will of the institution;" and that the price, including the liabilities assumed by the purchaser, was $90,000. The price paid was promptly held by the court to be incompetent. On cross-examination the witness testified that, during the 4½ years of his management, the company had lost $37,000, and said:

"It is difficult to state what the good will of a paper might be worth, suppose the paper had lost eight or nine thousand dollars a year for four years, and then continued to lose for four years more. Conditions surrounding a newspaper affect its value, and franchises might increase or decrease the value, without reference to the actual earning results. A franchise could be transferred subject to the confirmation of the association. I think, if the Tribune Company were hard up, or another newspaper company, my judgment would be that the franchise would be of value for the purpose of sale by the company. Its transfer would be subject to the confirmation of the association to which it belongs. It requires consent."

It had already appeared in the case—and is undisputed—that for four years after the sale by Stone, and to the time of the sale to the defendant, the Tribune Company had lost about $100,000. The following questions were then propounded and answered:

"*Q.* And with a paper that has lost money during your experience, as you have stated, and lost during the next four years an amount exceeding $100,000, and was then without resources of its own, what would you say, as a newspaper man, as to the fairness of an arrangement by which its assets and property of all kinds was trans-

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ferred to the News Association, to furnish the capital and conduct the paper, and return to the stockholders one-half of any profits made?

"*A.* I can't judge whether it would be fair and reasonable without a knowledge whether it was the best thing that could be done. If nothing else could be done, and the concern was unable to continue, it might be the wisest course. At the same time it might have been possible to have sold the paper for more than they realized in that way.

"*Q.* Do you think it possible to sell a paper that has lost in eight years $150,000, and is then in debt sixty-five to seventy thousand dollars, with tangible assets of less than one-half that amount?

"*A.* I think such things are done at times when the fool-killers are asleep. Such things are not very rare."

On redirect examination he was asked to give what he regarded as the elements of value in a newspaper, to which he replied:

"First, I should regard field and opportunity; second, good will; third, condition of organization of the enterprise. That would include most everything, like its franchise, etc."

Under objection and exception the witness was then asked:

"*Q.* You know what the Associated Press is and you have already stated what it is. What, in your judgment, would be the value of a franchise, in the city of Detroit, like the Associated Press or the Western Associated Press,—either of them?

"*A.* It might be worth more to you than to me. All those matters come, to a certain extent, under the head of opportunity and the capacity to make use of. I have known times in the last 10 years when I should regard the value of the Associated Press franchise in the city of Detroit worth $100,000. (Stricken out on motion. Question read.)

"*Q.* Confine your answer to January, 1895.

"*A.* I should regard a franchise in the Associated Press as worth all the way from $20,000 to $100,000, according to the circumstances of the business and the opportunity and capacity of the purchaser to use it."

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We do not think that this opinion of the witness was competent. His opinion was but a mere guess, and furnished an opportunity for the jury to guess. Outside the value of this franchise, there was no evidence to show that the tangible assets of the Tribune Company were worth any more than the price paid for them and credited on the debt due from that company to the News Association.

4. The learned trial judge, after instructing the jury "that, if such transfer [of the tangible assets] was a *bona fide* conveyance of such property for an adequate price to satisfy an actual indebtedness, then such transfer would be valid, even though its effect would be to defeat the other creditors of the said the Tribune Company," instructed them as follows:

"If you find that thereafter the Tribune Company possessed no other valuable property interests, rights, and franchises than the good will of its business and contracts with news associations, then the defendant would be entitled to a verdict, because such property would not be subject to levy and sale under a writ of execution, and even if you should believe that it was transferred to the Evening News Association for the purpose of defrauding the creditors of the Tribune Company, yet it is not such property that, when separated from the tangible assets, can be reached in proceedings of this kind. And there is no proof that any profits have accrued to the defendant by the use of such good will and franchises."

While the good will of such a business and the franchise of the press association may be the subject of contract between vendor and vendee, it needs no argument to demonstrate that a judgment creditor cannot get title to either by an execution sale. The judgment creditors may sell all the printing presses and other personal property, but the purchaser would not thereby acquire the right to publish the Tribune and receive the benefits of the good will and franchises of the business. The company might at once purchase or rent new presses, etc., and continue its publication. The entire assets of a partnership may be sold on execution, but the sale does not carry with it the

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good will of the firm. Nearly all the cases cited by counsel relate to the rights of partners *inter sese*. There are, of course, cases where the good will attaches to the property itself, and not to the business or partnership. In such case the business and the property are inseparable. *Chittenden* v. *Witbeck*, 50 Mich. 420. In *Wedderburn* v. *Wedderburn*, 22 Beav. 84, it was held that the good will of a business does not belong to the surviving partners except by express agreement. See, also, *Fenn* v. *Bolles*, 7 Abb. Prac. 202. In *Hathaway* v. *Bennett*, 10 N. Y. 108 (61 Am. Dec. 739), it was held that the route of a newspaper carrier might be the subject of sale, like the good will of a trading establishment or the ride of a physician, but it, *ipso facto*, gave the purchaser no right of action against the publisher. It is there said: "A mere privilege may be the subject of sale if the purchaser is willing to run the risk of failing to enjoy it." So this press franchise would be of no validity or value to the vendee of the Tribune Company, unless the press association and its members in Detroit consented to the transfer. But of what value can the good will and a nontransferable franchise be to a business which for years had been losing money at the rate of $25,000 per year?

5. At the time of the transfer, as appears by the evidence in behalf of the plaintiff, the Tribune Company was indebted to the News Association in the sum of $37,000, and the jury so found. There is no evidence that this was not a *bona fide* indebtedness. The price of the press and other property transferred January 11th was $11,000. The price of the other property transferred in the following month was $24,287.95. These comprised all the tangible assets of the Tribune Company, and, according to the undisputed evidence, were worth $35,287.95. After that time, and before the writ of garnishment was served, the defendant had paid other debts of the Tribune Company, amounting to $30,000. It thus appears that the tangible assets of the Tribune Company were not equal to its debt to the defendant at the time of the sale. The only

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basis on which a judgment in garnishment can be rendered against the defendant is that it had money, property, or effects in its possession or control belonging to the Tribune Company, and which it may produce in response to the writ, or that such property was fraudulently conveyed to it, which it refuses to produce. A defendant in garnishment may either produce the property in his hands or permit judgment to go against him for its value. These assets must be tangible, not intangible. In view of the fact that the Tribune Company had done a losing business, and during the nine years preceding this suit lost about $137,000, it is evident that the mere fact that the good will of the business and the press franchise were not given a value, if they were included in the sale, is not evidence of fraud in the transaction, nor do they constitute tangible assets for which the defendant can be held liable as garnishee.

But the claim is that this franchise and the good will of the business were valuable, and that the jury were at liberty, from this fact alone, to find that the entire transaction was a fraud, and that therefore the tangible assets, which were conveyed to the defendant for their full value, became subject to garnishment. To illustrate: A., a physician, sells to B., another physician, his books, instruments, office fixtures, and accounts for $5,000, their full value, and also conveys to him the good will of his business. C., a creditor of A., may sue A. and garnishee B., and attack the sale as fraudulent, because no price was fixed for the good will of the business. So, too, under the supposed case, if the good will of the business were sold at $1,000, a jury might find the transaction fraudulent, because in their judgment it might be worth $5,000, if they could find another physician to swear that in his judgment it was, and that, too, in face of the fact that A. had not made a living, but had lost money in his practice. I am not aware of any case which holds such a transaction fraudulent, or open to attack by creditors. The purchaser in such case may be

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willing to pay even a large sum for the good will, thinking that by his superior skill and energy he may make it valuable; but this is no evidence of its actual value. So the fact that Scripps paid a large amount for the Tribune Company, with its record of losses, is not evidence of the value of its good will or of the press franchise which it had.

It may be proper to here note the transactions between the two companies as they appear upon the records. January 7, 1895, the following appears upon the record of the board of directors of the Tribune Company:

"J. E. Scripps moved that E. B. Whitcomb and George G. Booth constitute a committee to negotiate with the Evening News Association for the sale of the machinery and fixtures to the said Evening News Association, and to establish a rental to be paid to the News for the use of the plant. Adopted. E. B. Whitcomb moved J. E. Scripps and George G. Booth be a committee to submit to an adjourned meeting a plan for the lease of the Tribune to the Evening News Association for the purpose of securing increased economy in the operation of the various departments. Adopted. On motion, the stockholders took a recess for two weeks to await the report of the committee."

On the same day the following action was taken by the board of directors of the News Association:

"On motion of J. S. Sweeney, the salaries of the managing director and manager were made the same as last year. J. S. Sweeney moved that the interest in the engine, boiler, electric plant, and presses now owned by the Tribune Printing Company be purchased at a fair valuation by this association for the simplification of the business, and then the Tribune be charged 10 per cent. upon the said valuation for the use of said plant. Also, that the president and secretary be a committee to arrange the transfer. Carried."

In a few days trouble arose in the Detroit Typographical Union as to the transfer of matter between the Evening News and the Tribune. This resulted in the transfer of the balance of the assets and property of the Tribune

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Company to the News Association, under the following resolution, adopted March 6, 1895:

"March 6th. Meeting of directors at the residence of the president. Present: J. E. Scripps, J. S. Sweeney, George G. Booth. Mr. Booth offered the following: '*Whereas*, in the interests of economical management, the mechanical department of the Evening News and Detroit Tribune have for some months past been operated jointly; and *whereas*, the requirements of the Typographical Union demand entire amalgamation of the two properties, if the existing advantages are to be continued; and *whereas*, the Tribune Printing Company, by its directors, has offered to sell to the Evening News Association the entire printing business, on terms which shall be fixed by the said Evening News Association: *Therefore*, *resolved*, that we pay the Tribune Company, as consideration for the property turned over to us, one-half the net profits that may accrue from the publication of the morning, Sunday, and weekly issues, until such time as experience may show change or modification in this basis to be wise and just.' Resolution seconded by Mr. Sweeney, and unanimously adopted. It is understood that, in reckoning the profits of the Tribune portion of the business, no account is to be taken of the interest on the Tribune debt, which is to be paid by the Tribune Printing Company.

"On motion the meeting then adjourned.

"GEORGE G. BOOTH, Secretary.
"JAMES E. SCRIPPS, President."

Nothing is said in these sales about the good will of the Tribune Company or the press franchise. If, however, we assume that the Tribune Company intended to convey them, this cannot affect the question. The result did not prove very profitable to the News Association, for it lost $10,000 the first year in carrying out the arrangement. We thus have the Tribune Company, which had always been a losing business, sold by Stone to Scripps; after four years more of failure and heavy losses, sold by Scripps to the defendant; full value paid for all its tangible assets; the sale reasonable upon its face, at least as to the Tribune Company; the Tribune Company still in existence, and entitled to receive from the defendant one-half the net profits which may result from the publication

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of its issues; and a jury permitted to find the transaction fraudulent upon the opinion of a witness who testified that it might be possible to sell a newspaper in the condition in which this was, "when the fool-killers are asleep." I cannot yield assent to such a doctrine. The fact that a great majority of the stock of both corporations is owned by the same parties does not of itself stamp as fraudulent, either in fact or law, a transaction otherwise fair. It is not a fraud *per se* for one corporation, a debtor, to transfer its property to another corporation, its creditor, in payment of its debt, where there is no great undervaluation of the property. *Spear* v. *Rood*, 51 Mich. 140; *Fraser* v. *Passage*, 63 Mich. 556. We are aware of the rule found in the following cases: *Cole* v. *Millerton Iron Co.*, 133 N. Y. 164 (28 Am. St. Rep. 615); *Montgomery Web Co.* v. *Dienelt*, 133 Pa. St. 585 (19 Am. St. Rep. 663); *Grenell* v. *Gas Co.*, 112 Mich. 70; but they do not apply to this case, where full value was paid for the property.

Upon this record the court should have directed a verdict for the defendant.

Judgment reversed, and new trial ordered.

LONG, C. J., concurred with GRANT, J.

HOOKER, J. I concur in the reversal of the judgment in this cause. It was not disputed that the plaintiff recovered a judgment against the Detroit Tribune Printing Company for libel. It was not denied that all of the assets of the Tribune Printing Company were assigned to the Evening News Association. The issue in the case was whether such assignment was a *bona fide* transaction, upon a sufficient consideration, and free from fraud of which its creditors could complain. This issue the defendant had a right to suppose would be tried upon its merits, and it was under no obligation to try any other issue, or to be subjected to the danger of jurors' prejudices being aroused by evidence relating to other matters, or by unwarranted appeals by counsel. Counsel

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insisted on showing, by cross-examination of Mr. Scripps, who owned the majority of the stock in each company, that the plaintiff had asked the Tribune Company to retract the libel which was the foundation of his judgment, and that it had never been done. It is now said that this testimony tended to show malice and vindictiveness upon the part of the Tribune Company. If there was a demand of retraction, which was not complied with, it is reasonable to suppose that it was not lost sight of in the trial of the libel case, and doubtless is to be found duly charged against the company in that judgment, which conclusively settled the question of malice against the company. The only possible view that would justify this evidence is that it had some influence upon the Tribune Company in the way of prompting it to fraudulently dispose of its property with a design to prevent the collection of the judgment, and we think the inference of malice or vindictiveness to be drawn from a failure to retract would not go any further in that direction than would the judgment itself. Apparently counsel for the plaintiff did not offer it for this purpose, for not only did he not give that reason for offering it, but he objected to the defendant's going into a rebuttal of the alleged claim of malice or vindictiveness, which it clearly had a right to do if it was a vital question in the case. This examination, and the manner in which it was conducted, was, in our opinion, well calculated to prejudice the defendant with the jury, and the judge should not have permitted it.

The same may be said of the language of counsel in criticising the witness Scripps. We are disposed to make all reasonable allowances for professional zeal, but we think this was not justified by any evidence in the case; and, if it was of any value to the plaintiff in the case (as we are bound to suppose that counsel considered it to be), it was rather in the direction of arousing the indignation of the jurors against Mr. Scripps and his company than in calling their attention to evidence which justified the conclusion that this transfer was made for the pur-

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pose of avoiding a judgment of small moment in comparison with the transaction between the companies.

The plaintiff, having garnished the defendant, attacked its purchase of all the assets and property of the Tribune Company as fraudulent, and based the claim of fraud largely upon the proposition that it obtained property in excess of its claim against the Tribune Company. Whether this was true or not depended upon the value of an Associated Press franchise, so called, and the good will of the business, which were acquired by the purchase. It is claimed, perhaps correctly, that this franchise was not property which was subject to execution, being intangible; and it is said that it could not be reached by garnishment because intangible, and not subject to execution. But, if that be conceded, it does not, in my opinion, follow that such of the property as was tangible might not be thus reached. If the transaction was fraudulent, all of the property was taken subject to the rights of creditors. There was testimony tending to show that the press franchise was valuable. If it is a privilege which is essential to a daily newspaper, and one which is granted to but one or two newspapers in a city, it is reasonable to suppose that it would be a privilege much sought; and while it appears that the franchise, being no more than a contract personal in its nature, cannot be used by an assignee without the consent of the press association, it does not necessarily follow that it has no value, because it is possible that it can be made available by obtaining such consent, either under the existing rules of the press association or for a nominal consideration. If, as we gather from the case, this privilege is one that is granted to but one or two newspapers in the city of Detroit, there may be great benefit in obtaining a relinquishment of the right. If the franchise was valuable, there would seem a moral reason why the vendor (a debtor) should apply it to the payment of its debts. It is said that the creditor is not interested in the matter, because



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it is not subject to execution. Were it property exempted by law, we think this would be obvious, under decisions of this court; but we think the law should not erect a barrier against a creditor which has no more substantial foundation than the legal fiction that this right, resting in contract personal in its character, is of no value in the hands of the assignee, when it is obvious that it may be of great value as a matter of fact.

Again, the good will of the Tribune may have been valuable, although intangible, and, if so, its acquisition tended to increase the excess of the value of the property purchased over the purchase price. The effect of the theory of counsel would be to set off the assets called tangible against the purchase price, and to disregard the intangible assets because not subject to attachment or garnishment, although it seems patent that the intangible property may have been of much value. Good will has been frequently held to have value, and to be subject to contract. In *Chittenden* v. *Witbeck*, 50 Mich. 420, it was recognized that it was valuable in connection with an hotel. It was there said: "By good will we suppose must be intended the favor which the management of the Russell House has won from the public, and the probability that the old customers will continue to give it their patronage for the future." It would seem that an established newspaper might have a similar hold upon its patrons. It is not for us to pass upon the merits of this question, which is plainly a question of fact, and is for the jury or trial court.

The judgment should be reversed, and a new trial ordered.

MONTGOMERY and MOORE, JJ., concurred with HOOKER, J.

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## SNYDER v. CITY OF ALBION.

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1. MUNICIPAL CORPORATIONS — CLAIMS FOR TORT — PRESENTATION TO COUNCIL.

A charter provision that no suit shall be maintained against a city on any account or claim until the same shall have been presented to the common council does not apply to actions *ex delicto*.

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2. SAME — PERSONAL INJURIES — NATURE OF CLAIM — SUFFICIENCY OF DECLARATION.

Plaintiff's intention to rely upon structural as well as surface defects in a bridge, by the collapse of which she claims to have been injured, is sufficiently indicated by the averment in her declaration that the defendant allowed its sidewalk and bridge "to become and remain broken, torn up, and out of repair, and not reasonably safe and convenient for public travel," and that, "while the plaintiff was walking over said walk and bridge, said sidewalk and bridge, by reason of its being in an unsafe, broken, torn up, and out of repair condition, broke and fell into the river." So *held*, at least, where, though no demurrer had been interposed, want of notice of the exact nature of the claim was urged to defeat the verdict.

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3. SAME—WOODEN STRUCTURES—NOTICE OF DECAY.

The capacity of white pine for holding nails when sound, and its lasting qualities, as compared with other timber, may properly be shown in an action wherein defendant is claimed to have had constructive notice, by reason of the lapse of time, of the decay of a bridge built of such material.

4. SAME—EVIDENCE OF OTHER DEFECTS.

The decayed condition of the timbers in other parts of the bridge than that which collapsed may be shown for the same purpose.

5. PERSONAL INJURIES—PLEADINGS AND PROOFS.

A declaration for personal injuries need not set out all of the results of the injuries claimed to have been sustained in order to render evidence of them admissible upon the trial. *Montgomery* v. *Railway Co.*, 103 Mich. 46, followed.

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6. MUNICIPAL CORPORATIONS—DEFECTIVE BRIDGE — CONSTRUCTIVE NOTICE.

A city is chargeable with constructive notice of the defective condition of a bridge within its jurisdiction, where the defect is of such long standing and of such character as actually to arrest the attention of passers-by, or of persons inspecting the bridge.

Error to Calhoun; Smith, J. Submitted February 10, 1897. Decided May 28, 1897.

Case by Julia J. Snyder against the city of Albion for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

*M. D. Weeks* (*Wilson & Cobb*, of counsel), for appellant.

*Pringle & Hewett* (*Thomas E. Barkworth*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment for injuries sustained by reason of the falling of a sidewalk which constituted a portion of the bridge crossing the Kalamazoo river in the defendant city. The defendant brings error. The record contains a large number of assignments of error, but the principal contentions of counsel may be treated of under two or three heads.

It is first contended that the plaintiff's case failed for the reason that she failed to show that the claim upon which she sued had been presented for adjustment and allowance to the common council of the city. The charter of the city (section 2, chap. 15, Act No. 296, Local Acts 1885) reads as follows:

"Said city council shall have authority to adjust and settle all accounts and claims against said city, and no suit or action shall be maintained against said city on any account or claim until the same shall have been presented to said council, and said council shall have had an opportunity to pass upon the same."

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We think this was not intended to apply to actions of this character. The word "claim," when used in some relations, may be broad enough to include a claim for damages in an action *ex delicto;* but, in the connection in which it is used in this statute, we think it is not so intended. In New York it has been held that the word "claim," as used in the Code, authorizing an attachment, does not apply to a tort. *Saddlesvene* v. *Arms*, 32 How. Prac. 280. See, also, *Stringham* v. *Winnebago Co. Supervisors*, 24 Wis. 594. The question has also arisen in various States under charter provisions similar to that contained in the charter under consideration. In *Howell* v. *City of Buffalo*, 15 N. Y. 512, the charter of Buffalo, which provided that "it shall be a sufficient bar and answer to any action or proceeding in any court, for the collection of any demand or claim, that it has not been presented to the common council for audit or allowance," was construed, and it was held that the provision did not apply to actions *ex delicto*. In *Harrigan* v. *City of Brooklyn*, 119 N. Y. 156, the charter of Brooklyn, which provided that "no action or special proceeding shall be maintained against the city unless it shall appear by the complaint that at least 30 days have elapsed since the claim or claims upon which said action or special proceeding is founded were presented in detail, and duly verified by such claimant or claimants, to the comptroller of said city for adjustment," was considered. It was said, "The words 'claim or account,' in connection with the purpose of presentation, and the designation of the officer to whom the presentation is to be made, naturally indicate claims on contract." In Wisconsin the statute provided that "no action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part." It was held in *Sommers* v. *City of Marshfield*, 90 Wis. 59, that this statute did not require a previous presentation of a claim

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for personal injuries. It was said: "This court has repeatedly held that the words 'claim or demand,' as used in the charter, do not include a cause of action for personal injury by reason of a defective street or sidewalk. * * * 'Claim or demand,' as thus used, include only such as arise upon contract." See, also, *Sheridan* v. *City of Salem*, 14 Or. 328; *City of Warren* v. *Davis*, 43 Ohio St. 447; and *Lay* v. *City of Adrian*, 75 Mich. 438.

Counsel for defendant rely upon the case of *Springer* v. *City of Detroit*, 102 Mich. 300. But in that case there was ample evidence in the act itself to indicate the sense in which the words "demand or claim" were used. The second paragraph of the provision quoted on page 302 was as follows:

"It shall be a sufficient bar and answer to any action or proceeding in any court, for the collection of any demand or claim against said city, that it has never been presented to the common council for audit or allowance, or, *if on contract*, that it was presented without said affidavit and rejected for that reason, or that the action or proceeding was brought before the common council had a reasonable time to investigate and pass upon it."

Mr. Justice LONG, in distinguishing this case from *Lay* v. *City of Adrian*, says:

"The Detroit charter expressly refers to unliquidated claims; and while it provides, in the first paragraph of the section referred to, that no unliquidated account or claim or contract shall be received for audit or allowance unless it be accompanied with an affidavit, and then proceeds to recite what the affidavit shall contain, the next paragraph expressly provides that it shall be a sufficient bar and answer to any action for the collection of any demand or claim that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit, and rejected for that reason."

We think the court did not err in overruling defendant's objections on this ground.

Numerous assignments are based upon the alleged insufficiency of the declaration. The declaration averred

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that the defendant allowed the sidewalk and bridge "to become and remain broken, torn up, and out of repair, and not reasonably safe and convenient for public travel," and that, "while the plaintiff was walking over said walk and bridge, said sidewalk and bridge, by reason of its being in an unsafe, broken, torn up, and out of repair condition, broke and fell into said Kalamazoo river," etc. The criticism made is that the declaration did not apprise the defendant that anything more would be claimed than that the surface of the sidewalk was out of repair. But, as the declaration was not demurred to, we think it sufficient to support the verdict, and that the charge that it broke and fell into Kalamazoo river by reason of its being out of repair could hardly be construed to apply to the surface, and must have apprised the defendant of the plaintiff's claim that the structure itself was defective, and for this reason fell.

Objection was made to the testimony of a witness for plaintiff, furnishing a comparison of white pine with other timber, in regard to its capacity for holding nails when sound, and as to its lasting qualities. This appears to have been based upon the statement that there was no allegation in the declaration that the bridge or sidewalk was constructed of defective material. The material may have been proper enough to use, but it would hardly be contended that a bridge constructed of wood would not require more frequent inspection than one constructed of stone, if well built. This testimony was offered for the purpose of indicating when the defendant should, in the exercise of prudence, have looked for decay. And we think, in the same connection, it was competent for the witness to testify as to the decayed condition of timber in other parts of the bridge, which were really part of the same structure.

Error is assigned upon the admission of evidence of the plaintiff's injuries, the claim being that certain particular injuries named were not set out in the declaration. The testimony was directed rather to the results of injuries,

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and the case falls within *Montgomery* v. *Railway Co.*, 103 Mich. 46.

It is argued in the brief of defendant's counsel that, upon the whole case, the verdict should have been directed for defendant; the principal claim being that there was no evidence that the defendant had actual notice, or that the defect was of such long standing and of such character that the defendant could be charged with constructive notice, of the defect. But, without going at length into the testimony, we think that sufficient appeared by the testimony of defendant's witnesses to warrant the jury in drawing the inference that the committee of the council had sufficient notice of the decayed condition of the timbers supporting the bridge to have called for action on the part of the city. There was evidence showing conditions which indicated that an inspection would have disclosed the condition of these timbers, and whether such inspection was timely made was a question for the jury, under the testimony in this case. The court charged the jury that notice to the city might be either actual or constructive, and that, if the condition of the bridge was such that by reasonable diligence the city should have known of its defective condition, that would be constructive notice, but that such notice could not be presumed unless of such long standing and of such a character as to actually arrest the attention of passersby, or of persons inspecting the bridge, and that the burden of showing these facts was upon the plaintiff. We think this instruction sufficiently favorable to defendant, under the ruling in *Township of Medina* v. *Perkins*, 48 Mich. 71; *Stebbins* v. *Township of Keene*, 55 Mich. 557; and *Moore* v. *Township of Kenockee*, 75 Mich. 332.

We think, upon the whole record, that the case was fairly presented to the jury, and that the judgment should be affirmed.

The other Justices concurred.

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## KAY v. TOWSLEY.

1. MECHANICS' LIENS—MORTGAGE—PRIORITIES.
   Under section 9, subd. 3, of the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893), providing that such liens shall be preferred to all other titles, liens, or incumbrances which may attach to or upon the building or land subsequent to the commencement of such building, a mechanic's lien takes precedence of a mortgage executed after the actual commencement of the building, although no part of the labor or materials for which the lien is claimed was performed or furnished until after the execution and recording of the mortgage.

2. SAME—NOTICE OF LIEN—SERVICE.
   Section 6 of the act, providing for the service of a copy of the statement of lien upon the "owner" of the premises, does not apply to a mortgagee whose security is in the form of an absolute conveyance.

Appeal from Shiawassee; Smith, J. Submitted April 6, 1897. Decided May 28, 1897.

Bill by Richard F. Kay against Matthew P. Towsley, Charles A. Jason, Ephraim C. Wagar, Benjamin B. Crapo, and others, to foreclose a deed as a mortgage; and by Ephraim C. Wagar and Benjamin B. Crapo against Richard F. Kay and others, to enforce a mechanic's lien. The causes were consolidated and heard together; and, from a decree adjudging the mortgage lien paramount to the mechanic's lien, said Wagar and Crapo appeal. Reversed.

*F. S. Porter*, for appellants.

*John T. McCurdy*, for appellee Kay.

LONG, C. J. On or about May 15, 1895, the defendants Matthew P. Towsley and Charles A. Jason, being

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the owners in fee simple of certain lands in the village of Shaftsburg, Shiawassee county, commenced the erection of an hotel building thereon. On May 29th, when the foundation wall of said building was completed, they arranged with complainant, Kay, for a loan of $300, and on the same day, for the purpose of securing payment thereof, executed to him a deed of said lands, absolute in form, and thereupon took back a land contract from him, providing for his redeeding said lands to them upon the payment of said sum. This sum was advanced to them by complainant as follows: $75 on that date, $125 on June 6th, and $100 on June 15th. On June 25th, Kay loaned them $50 more. The deed was recorded June 3, 1895. The land contract was not recorded. Towsley and Jason continued in possession of the premises, and completed the erection of the building.

On June 25, 1895, Wagar and Crapo commenced furnishing materials to Towsley and Jason for the erection of the building, and from that date to August 17th of the same year, inclusive, furnished them with materials to the sum of $234.31, which materials, it is conceded, were used by Towsley and Jason in the construction of the building. On October 15, 1895, Wagar and Crapo filed a notice of their intention to claim a lien on said premises, in the office of the register of deeds for Shiawassee county.

On November 9, 1895, Kay filed his bill in the circuit court for the county of Shiawassee, in chancery, to foreclose said deed as a mortgage. Afterwards, and in due time, Wagar and Crapo filed their bill in said court to enforce a mechanic's lien upon said premises. The two suits were consolidated by stipulation, and heard as one suit. On the hearing the court decreed Kay a first lien under his mortgage on said premises, and defendants Wagar and Crapo a lien thereon to the amount of their claim, subject to said mortgage. Wagar and Crapo appeal. They claim they are entitled to a lien on said premises paramount to that of complainant's (Kay's) mort-

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gage, for the reason that said mortgage was executed subsequent to the commencement of the erection of said hotel building.

Subdivision 3, § 9, Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893, provides that mechanics' liens "shall be preferred to all other titles, liens, or incumbrances which may attach to or upon such building, machinery, structure, or improvement, or to or upon the land upon which they are situated, subsequent to the commencement of said building, erection, structure, or improvement." This provision has been passed upon frequently by the courts, and it has been uniformly held that the lien has priority over a mortgage executed upon the lands or premises after the actual commencement of the building, though no part of the labor performed or materials furnished for which the lien is claimed was done or performed until after the execution and recording of the mortgage. *Haxtun Steam Heater Co.* v. *Gordon*, 2 N. Dak. 246 (33 Am. St. Rep. 776); *Murray* v. *Swanson*, 18 Mont. 533; Phil. Mech. Liens (3d Ed.), § 216; 2 Jones, Liens (2d Ed.), § 1470; *Davis* v. *Bilsland*, 18 Wall. 659; *Dubois' Adm'r* v. *Wilson's Trustee*, 21 Mo. 213; *American Fire Ins. Co.* v. *Pringle*, 2 Serg. & R. 138; *Lampson* v. *Bowen*, 41 Wis. 484; *Vilas* v. *Manufacturing Co.*, 91 Wis. 607; *Hewson-Herzog Supply Co.* v. *Cook*, 52 Minn. 534. It is held that, under such a provision, liens attach as of the date of the commencement of the building, erection, or other improvement, regardless of the time when, or the person by whom, the particular work was done or the materials furnished for which a lien is claimed. 2 Jones, Liens (2d Ed.), § 1470.

But it is claimed that a copy of the notice of lien was not served upon the complainant. This was not necessary, under section 6 of the lien law. It was sufficient to serve it upon the owner of the premises. The complainant's rights were those only of mortgagee.

The court below was in error in holding the mortgage

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paramount to the lien. The decree must be reversed, and one entered here giving defendants Wagar and Crapo a lien prior to the complainant's mortgage. The defendants will recover their costs of both courts.

The other Justices concurred

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## OAKLAND COUNTY SAVINGS BANK *v.* STATE BANK OF CARSON CITY.

1. BANKS AND BANKING—TRANSFER OF STOCK—BONA FIDE PURCHASER—LIEN OF BANK.

   A *bona fide* purchaser of bank stock is not protected against a lien of the bank for an indebtedness due from the transferrer.

2. SAME—ESTOPPEL—AUTHORITY OF CASHIER.

   A bank cashier, by his declarations that the bank has no lien upon the stock of a shareholder, estops the bank, as against one who relies thereon to his detriment, from asserting a lien on the stock for an indebtedness then due it, notwithstanding that, under 3 How. Stat. § 3208a8, a transfer upon the books of the bank can be made only by the consent of the directors, when the holder is indebted to it on matured paper. HOOKER and GRANT, JJ., dissenting.

Appeal from Ionia; Davis, J. Submitted February 9, 1897. Decided May 28, 1897.

Bill by the Oakland County Savings Bank against the State Bank of Carson City to compel a transfer of stock upon the books of the defendant. From a decree dismissing the bill, complainant appeals. Reversed.

*Fedewa & Walbridge*, for complainant.

*Fitz Gerald & Barry* (*George H. Cagwin* and *Francis A. Stace*, of counsel), for defendant.

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MONTGOMERY, J. Complainant, on the 23d of March, 1893, extended a credit to Samuel S. Walker, a stockholder in the defendant corporation, upon his promissory note of $3,000, and took as collateral three certificates, each representing $1,000 worth of stock in the defendant bank. Subsequently $1,000 of the principal was paid, and one of the certificates of stock surrendered. This bill is filed, after a refusal by the defendant bank to recognize the complainant's ownership in the stock, and to transfer the same upon the books of the bank, to compel such transfer.

After receiving the certificates, and on the next day, the complainant's cashier wrote to the cashier of the defendant, saying:

"We have taken 30 shares of stock of your bank, represented by certificates 83, 84, and 85, issued to Samuel S. Walker, as collateral security to a loan. Please advise us if you have any lien on said stock."

To which the defendant's cashier replied:

"Your favor of the 24th to hand, in relation to bank stock. In reply, would say I do not hold any lien on said stock.

"Yours truly,
"E. C. CUMMINGS, Cashier."

At the time of the transfer of the stock by Walker to the complainant, Mr. Walker stated to the cashier of complainant that he was not indebted to the defendant bank. It now appears that at the time this letter of Cummings was written to the cashier, and at the time of the loan, Walker was indebted to the defendant bank, and under the statute a lien existed in favor of the defendant bank upon the stock. At the time the loan was procured, Mr. Walker was financially responsible, and it is reasonably clear that, if the defendant's cashier had informed the complainant of the true situation, the complainant would have been able to secure its claim. Walker has since become insolvent.

Two contentions are made on behalf of complainant:

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*First*, that complainant, in the first instance, as transferee of the stock, is entitled to priority over the defendant bank, as a *bona fide* purchaser of such stock; *second*, that, if this be not true, still the defendant has, by the letter of its cashier, estopped itself from asserting a lien upon the stock entitled to priority over complainant.

The first question is ruled against the complainant's contention by *Michigan Trust Co.* v. *State Bank of Michigan*, 111 Mich. 306, and *Citizens' State Bank of Monroeville* v. *Kalamazoo Co. Bank*, Id. 313. We think, however, that the defendant should be held estopped from asserting the priority of its lien upon this stock. The defendant's contention is that under section 3208*a*8, 3 How. Stat., a transfer of the stock upon the books of the bank can be made only by the consent of the directors, in a case where the owner of the stock is indebted to the bank on matured paper at the time of the attempted transfer, and that the assignee takes the stock subject to this right. From this it is contended that, as the transfer of the stock subject to such a lien can only be made with the consent of the board of directors, it necessarily follows that the bank can only estop itself through the action of the board of directors. We think this contention cannot be maintained. Undoubtedly, as to one *having knowledge* of the fact of an indebtedness owing by the owner of the stock to the bank, the cashier would be without authority to waive the bank's lien. But that is not this case. It is the common practice for cashiers to have control of the books of the bank, and to conduct its correspondence. It cannot be doubted that the purchaser of stock *not* incumbered by a lien in favor of the bank might have it transferred upon the bank's books without the consent of the board of directors; and the estoppel in this case arises out of the failure of the proper officer, who is custodian of the books of the bank and of its bills receivable, to truthfully answer a question relating to facts peculiarly within his knowledge.

The case of *Cochecho Nat. Bank* v. *Haskell*, 51 N. H.

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116 (12 Am. Rep. 67), is instructive upon this question. Two questions were presented in that case: One was whether the cashier of the bank had power to discharge a debtor of the bank without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed, or that he should have no further trouble from it; and, *second*, whether the bank could be estopped by his declaration that the note was paid. It was held, as to the first question, that it could not be inferred that the power to discharge an obligation due to the bank without payment, or to make such an agreement with a surety as that suggested, was within the scope of the cashier's authority; but the court say:

"It would be otherwise, we think, as to his declaration that the note was paid. It is his duty to receive payment, and to keep the account of it, and he is the proper person to apply to, to ascertain whether a note has been paid or not. It would, indeed, be peculiarly within the scope of the business confided to him, to give such information."

So here the complainant addressed the custodian of the books and of the bills receivable of the bank for information, and, when the cashier spoke in response to this request for information, the bank spoke, and should be held estopped from now asserting the facts to be otherwise than as stated to complainant in response to its inquiry. See, also, *Merchants' Bank* v. *State Bank*, 10 Wall. 604. To assert that the law says that the cashier may not permit the transfer of stock of the bank while the lien exists upon it, that it follows from this that he cannot deprive the bank of a lien, and that, therefore, every one is bound to know that, if the bank is to be estopped by any one, it is the directors, is to describe in sections the circumference of the same circle. The question is not what steps should be taken by the purchaser of stock with knowledge that it is subject to a lien in favor of the bank, but the question is what are proper steps to be taken to ascertain *whether such a lien exists.* If one may not do this by correspondence with the bank, or with the officer of the bank uni-

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versally recognized as representing the bank in its correspondence, there would seem to be an end to legitimate transactions in stock of corporations. The fault in this assertion lies in a failure to recognize that, preliminary to the question of whether there shall be a transfer, preliminary to the purchase of the stock, common prudence suggests that the purchaser may inquire in the usual channels for the purpose of ascertaining whether the stock is subject to a lien. If such an inquiry be directed to the party who conducts the correspondence of the bank, it is bare assertion to say that, because he has not the power under the law to compel the board to consent to the transfer of the stock, he cannot, through a simple lie, estop the bank. The point is that in the correspondence upon the subject the bank speaks, through the cashier. It is the bank that speaks, itself, by an assertion which *it* makes by a perfectly proper and competent agency in that behalf.

The decree should be reversed, and a decree entered in this court for complainant.

LONG, C. J., and MOORE, J., concurred with MONTGOMERY, J.

HOOKER, J. (*dissenting*). S. S. Walker, a stockholder in the defendant, which is a corporation organized under the State banking law, assigned 30 shares of his stock to secure a note that he gave to the complainant. Subsequently the complainant asked that said stock be transferred to itself upon the books of the defendant, and, being refused, filed the bill in this case to compel it. It appears that, at the time the stock was assigned, Walker was indebted to the defendant upon paper then due, and has so continued since, and defendant asserts a lien upon the stock under the statute.

The recent cases of *Michigan Trust Co.* v. *State Bank of Michigan*, 111 Mich. 306, and *Citizens' State Bank of Monroeville* v. *Kalamazoo Co. Bank*, Id. 313, support defendant's contention. It is said, however, that the defendant should be estopped by the conduct of its cashier

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from setting up a claim against the complainant. This is based upon correspondence between the cashiers of the two banks, whereby it is said to have become the duty of defendant's cashier to inform the complainant of Walker's indebtedness, which he did not do. Section 3208*a*8 of 3 Howell's Annotated Statutes justifies a bank in refusing to transfer stock during the time that the owner is indebted to the bank upon matured paper, and assignees of the stock take it subject to this right. Furthermore, the act expressly prohibits the transfer of such stock upon the books at such a time *without the consent of the board of directors.* It is said that the cashier is the officer of whom a person proposing to buy stock would naturally inquire to ascertain whether or not the bank had a lien upon it, and that the purchaser would have a right to rely upon his statements, and that the bank could not afterwards question them by reason of an estoppel. The statute apparently attempts to secure the bank and its depositors against loss through its shareholders by providing a lien upon the stock for sums due to the bank from its stockholders. It makes a transfer by a registered stockholder, at a time when he owes an overdue claim, invalid as against the bank, and prohibits a change in the registered ownership except by the consent of the board of directors. If any one can estop the bank, it is the board, not the cashier, whom the law deprives of all power to transfer the stock without consent of the directors, where the effect of the transfer is to cut off a lien. No one would pretend that a statement by a janitor could estop the bank. Could the messenger, collector, bookkeeper, teller, assistant cashier, vice president, or one of the directors, in such a case? It may be said that they are on a different footing, because they are not the officers who represent the bank in its ordinary business transactions, while a cashier is. It is doubtless a common practice to treat cashiers as the business managers of banks, but the law imposes no such



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duties upon them, nor does it confide any specific power of this character to them. On the contrary, it expressly prohibits it. The statute (section 3208*a*3) provides that the board of directors shall define his duties, as is the case in the national banking law. And it is not uncommon to find presidents or vice presidents in charge of banks. But, if it be admitted that the cashier has general charge, there is one thing that the law says he cannot do, and that is to deprive the bank of a lien. Every one is bound to know that, and that, if the bank is to be estopped by any one, it is by the directors. To say that the bank may be estopped in such a case as this is to say that, although a bank cashier is expressly deprived of authority to do an act, he has the power to bind the bank if he does the act. Where the act constituting the estoppel is one which the bank has the power to confer upon the officer, but has not expressly done so, a practice by the officer of performing similar acts in the course of the business, to the knowledge of the bank, may create an estoppel. The case of *Cochecho Nat. Bank* v. *Haskell*, 51 N. H. 116 (12 Am. Rep. 67), was such a case; the opinion expressly stating that—

"He [the cashier] may, however, have been specially empowered to do the act, or he may have been allowed by the directors to take the general charge and management of the business of the bank, so as to bring such agreement or statement within the scope of his agency."

This case has gone to the extreme limit in sustaining an estoppel, but not nearly so far as it is necessary to go in this case to sustain the complainant's claim. See the case of *Merchants' Bank* v. *State Bank*, 10 Wall. 604. In that case it would seem that the bank might have given the cashier the power, and, if it had not, the court seem to have inferred it from the extensive authority which the bank permitted the cashier to exercise. But it does not go so far as to suggest that an act prohibited by law might become the basis of an estoppel. A strong dissenting opinion was filed in this case.

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In the case before us it is admitted that the cashier had not the power to transfer the stock, or to compel the board to consent to it, but it is claimed that through a simple lie he may accomplish this. The law seems to exclude the claim that the cashier had legal power to give such consent, if words are adequate to do so; and, if he could not bind the bank by an express agreement to waive its claim, he was certainly not able to do this by silence. Counsel for the defendant cite numerous authorities to the proposition that the power to release the security of banks is not vested in cashiers, on general principles; but, as the statute clearly prohibits it, we need not consider the question.

The decree should be affirmed.

GRANT, J., concurred with HOOKER, J.

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## RUHL *v.* A. RUOFF BREWING CO.

1. JUSTICES OF THE PEACE—GARNISHMENT—DISCLOSURE—LIABILITY OF GARNISHEE.

   Judgment cannot be rendered against a garnishee in justice's court unless his disclosure clearly shows a liability to the principal defendant.

2. SAME.

   A garnishee's disclosure which does not expressly admit an indebtedness to the principal defendant, but, on the contrary, avers that the latter is indebted to the garnishee, and further states that, prior to the service of the summons, the garnishee had contracted in writing to pay the liquor tax of the defendant, who thereupon paid a part of the amount of such tax to the garnishee, agreeing to pay the balance in monthly installments, and that the garnishee had not paid the tax at the time the summons was served, fails to make a *prima facie* case for the plaintiff.

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Error to Wayne; Donovan, J. Submitted April 6, 1897. Decided May 28, 1897.

Garnishment proceedings in justice's court by John F. Ruhl against the A. Ruoff Brewing Company, as garnishee of John Pennell. Plaintiff had judgment, and the garnishee appealed to the circuit, where verdict was directed for the plaintiff. Pending the entry of judgment upon the verdict, plaintiff died, and the cause was revived in the name of his executrix, Louise Ruhl. The garnishee defendant brings error. Reversed.

*George Cox*, for appellant.

*Durfee & Allor*, for appellee.

MOORE, J. Plaintiff had a judgment against John Pennell for $109, and instituted garnishee proceedings against the appellant, whose disclosure was made by its vice president, Edward Ruoff, who testified in justice's court as follows:

"I had some money before service of summons, but the company had entered into a contract with the principal defendant. I had not paid the money for license. The company had it in its possession. Defendant is indebted to me. The secretary of our company signed an agreement to pay defendant's license. Defendant has paid $135. This transaction was before the service of the summons."

Afterwards defendant was allowed to file an amended disclosure, and Ruoff testified, further:

"Our company made a contract with the principal defendant to pay his license, that was to be $300, which contract was in writing; and upon that agreement the company received from the principal defendant $135. This agreement was made prior to the service of the summons. Principal defendant was to pay balance at $25 a month. The license had not been paid by our company at the time of the service of the summons. The bond has been filed for license. August Ruoff and myself are the sureties as a part performance of this contract to pay the license."

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Plaintiff offered no other testimony. The circuit judge held this made a *prima facie* case of defendant's liability to the plaintiff. The appellant then asked Mr. Ruoff: "Now, at the time the summons was served upon you in this case, was the A. Ruoff Brewing Company indebted to John Pennell?" This was objected to. The objection stated by counsel was that Mr. Ruoff could not be cross-examined, because he was a witness for the plaintiff in the court below, and because he could not contradict his disclosure. The objection was sustained. The record does not disclose that an exception was taken. The following paper was then received in evidence:

"DETROIT, MICH., June 10, 1891.

"We agree to pay John Pennell's license for 69 Atwater street, for the year 1891 and the year 1892.

"A. RUOFF BREWING CO."

Mr. Ruoff testified that Mr. Pennell paid $135 on that agreement, and was to pay the balance at $25 a month. He was then asked: "Now, state whether you did or did not pay this license of $300." This was objected to, and the objection sustained. No exception appears in the record. The witness was then asked: "Were you, or were you not, indebted to J. Pennell when the summons was served upon you?" This was objected to, and the objection sustained, and an exception taken.

This is all the evidence in the case, and against the objection of the appellant the trial judge directed a verdict in favor of the plaintiff. The appellant brings the case here, assigning it to be error for the trial judge to hold that the disclosure of Mr. Ruoff made a *prima facie* case, and also assigning it to be error to exclude answers to the questions put to Mr. Ruoff, and in directing a verdict for plaintiff.

The plaintiff insists that, as the money had not been paid for the license, the appellant company was a trustee, and the fund could be garnished,—citing *Seaman* v. *Whitney*, 24 Wend. 260 (35 Am. Dec. 618); *Kelly* v. *Roberts*, 40 N. Y. 439; and other cases. The plaintiff

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also asserts that, as the appellant did not except to the rulings of the trial judge, it is not entitled to the benefit of its objection,—citing *Ellis* v. *Whitehead*, 95 Mich. 107. It will not be necessary to consider all these propositions. It has been repeatedly held by this court that the disclosure made by the garnishee defendant must show an indebtedness, or there must be a clear admission of goods, effects, or credits, not disputed or controverted by the garnishee defendant, in his possession, before he can be held. *Hewitt* v. *Wagar Lumber Co.*, 38 Mich. 705; *Sexton* v. *Amos*, 39 Mich. 699; *Spears* v. *Chapman*, 43 Mich. 541; *Weirich* v. *Scribner*, 44 Mich. 73; *Walker* v. *Railroad Co.*, 49 Mich. 446; *Isabelle* v. *Iron Cliffs Co.*, 57 Mich. 123; *Smith* v. *Holland*, 81 Mich. 476. In the case at issue, not only was there a failure to admit an indebtedness, but the garnishee defendant denied an indebtedness, and the evidence showed that an agreement had been entered into between the principal defendant and the garnishee defendant, and that the money had been paid as part performance of that agreement before the disclosure was made. The trial judge, instead of directing a verdict in favor of the plaintiff, should have directed one in favor of the garnishee defendant.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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## WHITE v. TOWNSHIP OF RILEY.

118 295
s121 414
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133 168
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147 462
148 605

NEGLIGENCE—DEFECTIVE BRIDGE—ABSENCE OF BARRIERS—PROXIMATE CAUSE.

The fact that the immediate cause of a horse's backing over the unguarded approach to a bridge was that he took fright at a crack in the flooring of the bridge, which, by reason of the action of wind and snow, had apparently largely increased in width, does not render the absence of barriers on the approach so remote a cause of the accident as to prevent a recovery therefor against the township having control of the bridge, based upon its negligence in this respect, if the situation was such as to be calculated to frighten horses of ordinary gentleness. LONG, C. J., and GRANT, J., dissenting.

Error to St. Clair; Vance, J. Submitted April 7, 1897. Decided May 28, 1897.

Case by Elizabeth White against the township of Riley for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

*Frank Whipple* (*J. B. McIlwain*, of counsel), for appellant.

*Avery Bros. & Walsh*, for appellee.

LONG, C. J. This action is for personal injuries, claimed to have arisen by the neglect of the defendant township. On the evening of January 23, 1894, plaintiff, with her husband, was riding in a two-wheeled cart, drawn by one horse, and attempted to cross what is called "Belle River Bridge." This bridge was 62 feet long, 16 feet wide, and about 10 feet above the water. The approach at the west end, where the accident occurred, is 16 feet wide, with wings or retaining walls extending

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westerly 12 feet and 6 inches, and widening westward to about 20 feet. The wing on the north side is from 6 to 7 feet above the water of the river, which comes close to the wall. The traveled part of the road at the west end of the bridge was 11 feet wide, and somewhat higher than the wall, with a slope to the wall. These retaining walls have no railings or barriers. The bridge had a substantial railing reaching to each approach. Across the whole bridge there were cracks between the planks, through which the river could be seen; and about 17 feet east of the west end of the bridge there was one crack 1½ to 2 inches wide in the center, and other smaller cracks near by. The bridge had been in this condition some 15 years. On the evening in question, when the plaintiff and her husband reached the bridge, it was snowing and blowing. Some two or more inches of snow had fallen, and the action of the wind had the effect of blowing the fallen snow back each way from the cracks at the west end of the bridge, causing them to appear much wider than they really were,—some of the witnesses say, as wide as the hand,—and leaving a dark-colored plank bare for an inch or more on each side. When the plaintiff had driven onto the west end of the bridge about the length of the horse and cart, the horse became frightened, backed off the bridge, swung around, and backed off the approach; the horse, cart, plaintiff, and her husband all going over. This action is brought to recover for the injuries so received. On the trial the court below directed verdict in favor of defendant.

The plaintiff claims:

1. That the defendant was negligent in allowing cracks in the floor of the bridge.

2. That the defendant was negligent in not constructing barriers on the retaining walls forming a part of the approach.

It is claimed that the horse became frightened at the crack in the bridge, and, by reason of no barriers being erected on the approach, the horse backed off, and caused the injury.

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It appears from the testimony of the plaintiff's husband, who was the only eyewitness to the accident aside from the plaintiff, that the horse was gentle, and the family were accustomed to driving her over the bridge; that the snow on that night had blown up through the crack, and parted, so that it had the appearance of nearly a plank gone; that he had no trouble whatever in driving the horse onto the bridge; that, when he had driven on some 12 or 14 feet, the horse snorted, and began to back up. The witness then stated:

"It had snowed about an inch and a half. It was snowing quite snug. The storm was blowing in her face. It was a regular flurry of a snowstorm, but not what you would call a blizzard. I examined the plank after the accident, and saw the crack, and the black space along the crack where the snow had blown back. Looked about six inches wide,—looked like a hole. The wind blowing up from the river parted the snow each way from the crack. * * * I know it was the wind blowing up through the crack that frightened her, because she snorted. * * *

"*Q.* Then I take it, from what you say, that on account of the storm, the blowing of the snow through the crack, and it looking so much larger than what it was, that the horse got frightened at it?

"*A.* Yes, sir.

"*Q.* Then, if there had been no storm at all, you could have driven over there just as well that night as any other time that you went over it, could you?

"*A.* Likely.

"*Q.* You never had any trouble?

"*A.* No; of course.

"*Q.* But if it hadn't been snowing at all, and blowing that way, you think you could have gone along just as safe as you ever did?

"*A.* Likely. * * *

"*Q.* You say the snow blowing and the bluster, and leaving a dark streak each side of the crack, scared your horse?

"*A.* Yes, sir."

Other witnesses were called, who testified that the snow had blown away from the crack on each side, leaving a

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dark streak on each edge of the plank. This testimony is wholly uncontradicted.

It is argued by counsel for defendant from this testimony that the changed appearance of the bridge, caused by the wind and snow, was the proximate cause of the injury; and that the township cannot be held liable for the action of the wind and snow. The court below stated, in directing the verdict for defendant:

"The fright of the horse was, therefore, without the fault of the township, and her backing off the bridge was also without its fault. The horse, having passed safely over the approach and onto the bridge, could not get off the bridge without some intervening cause. This intervening cause was the fright and backing of the horse, for which the township was not responsible. Without this intervening cause the accident could not have happened. It follows that the want of a railing was not the proximate cause of the plaintiff's injury, and she cannot recover."

Here was a perfectly gentle and steady horse. Plaintiff's husband says he had never seen her frightened before, and that his wife and children had driven her. He had broken her on an engine, and she would eat oats when the whistle was blown. His wife and children had driven her over this very bridge only the Saturday night before, and she had many times before been driven over it. There had been no change in the bridge. It had been built some 15 years, and had been used in perfect safety for that time by the public, who passed over it daily. It was one of the most frequently-traveled thoroughfares leading to the village of Memphis, in that county.

The first question in the case is whether the neglect to place a barrier along the approach was the proximate cause of the accident. Others, for many years, had passed there safely. The roadbed was wide enough for safe passage, and the testimony shows that this spot had been safely passed by the plaintiff on that night. The township is liable only where the neglect complained of

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was the proximate cause of the injury. If such neglect was the secondary or remote cause, the township is not liable. *Beall* v. *Township of Athens*, 81 Mich. 540.

It must, we think, be conceded, under the circumstances here stated, that the want of a barrier was not the proximate cause. But plaintiff contends that it was one of the causes, and that, where two causes unite in producing an injury, one being the negligent act or omission of the municipality and the other something for which neither the municipality nor the party injured is responsible, and where the injury caused could not have resulted but for the negligent act or omission of the municipality, such act or omission is the proximate cause of the injury. This contention, we think, is well supported by authority. *Selleck* v. *Railway Co.*, 93 Mich. 380, and cases there cited. It is further contended by counsel for plaintiff that the crack in the planking on the bridge was the cause of the fright of the horse, and, but for that and the want of barriers, the accident would not have happened. It is contended, further, that the testimony of many witnesses in the case shows that other horses had been frightened at that crack in the bridge many times.

But it appears conclusively that the plaintiff's horse never became frightened at the crack in its ordinary condition, and the testimony establishes the fact that, but for the changed condition of the crack on that night, the plaintiff's horse would have gone forward. The testimony of plaintiff's husband fully explains the cause of the fright. It was, he says, that the crack looked larger, and that was what the horse got frightened at; and that, if there had been no storm, he could likely have driven over at that time the same as at any other, and just as safely as he ever did. It was, as explained by him, the snow blowing and the bluster, and the leaving of a dark streak each side, that scared the horse. Most certainly the township authorities were not in fault for this. It was not one of the consequences which the township authorities should have foreseen and guarded against. It

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was the changed condition of the bridge, caused by the wind and snow, that was the proximate cause. The case is not like *Ross* v. *Township of Ionia*, 104 Mich. 320, where the water ran through the waste-weir, which frightened the horse. The roadway was constructed on the top of the dam, and no barriers were erected to the approaches. The horse backed off; and it was held that courts and juries should take into consideration the conditions which surround the highway at the particular point in determining whether a barrier should be erected. In the present case no such conditions existed that it can be said that barriers should have been erected. For 15 years it had been used with perfect safety. This horse had gone over it many times in safety, and it was only when other causes intervened, for which the township was not responsible, that the place became dangerous on that night. We think the court very properly directed a verdict for the defendant.

The judgment should be affirmed.

GRANT, J., concurred with LONG, C. J.

MONTGOMERY, J. I cannot accept the view that the defects in the highway and bridge shown by the evidence are not the proximate cause of the casualty resulting to plaintiff. I understand that the contention of defendant's counsel upon this point necessarily involves a concession that, for an injury resulting to the plaintiff by reason of a want of barriers, the plaintiff might be held entitled to recover, and, further, that the cracks in the bridge, in the condition in which they were, were calculated to frighten horses of ordinary gentleness. The evidence in the case tends to show not only that this is true, but that in many instances horses were actually frightened in attempting to cross this bridge. The contention gets down to this: That the cause of the horse's shying and backing up was the appearance of this bridge, which appearance was occasioned by the wide cracks in the floor of the bridge, and by the action of the wind in blowing the snow away from

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the cracks, giving an appearance of a wider opening than in fact existed. It would hardly be suggested that a highway is intended to be traversed only in fair weather. The authorities are so uniform that a highway is for every-day use, and that a traveler has the right to make use of the highway in the night-time, that such a contention would be without support if made. This court has frequently held that it is not incumbent upon municipal authorities to remove snow and ice, and this holding is based upon the ground that, as snow and ice are so common in this latitude, the intention of imposing the onerous duty upon a municipality of removing such accumulations will not be presumed in the absence of a clear expression of such legislative intention. It seems to me to be wholly illogical to hold the municipality exempt from this duty upon such grounds, and at the same time to hold that the natural action of snow, and the appearance which its fall would necessarily give to such a structure as the bridge in question, is so *extraordinary* as to amount to an intervening cause. The authorities were bound to know that snow falls in this climate, and that it will not rest upon air; that, if light, it will, to a greater or less extent, be blown back from a crack or opening such as that described in this bridge. This is no intervening cause. It is a condition necessarily arising out of other conditions sure to exist, namely, the cracks in the bridge and the storms which at certain seasons visit this latitude. Nor was the condition of this bridge such as might not have been foreseen by the authorities, if cognizance were taken of the action of the elements. If we adopt the rule that the authorities should be held responsible for such consequences as common experience would show to be usual, I think it is clear that the result cannot be held to be too remote to permit a recovery in this case.

The only distinction which can be made between this case and *Ross* v. *Township of Ionia*, 104 Mich. 320, is that in the *Ross Case* the conditions which caused the fright, and caused the horse to back off the approach to

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the bridge, existed the year round. In the present case, while this was not so, they were conditions certain to exist by the action of the elements, so common that this court, in taking judicial notice of the frequency of the fall of snow, has held the doctrine above alluded to. The fact that the injury occurred by the horse's backing away from the bridge because of its fright does not render a want of barriers too remote a cause to permit recovery. See *Langworthy* v. *Township of Green*, 95 Mich. 93; *Ross* v. *Township of Ionia*, *supra*; *Shaw* v. *Township of Saline*, *post*; *Gage* v. *Railroad Co.*, 105 Mich. 335.

I think the case should have been submitted to the jury under proper instructions.

Judgment reversed and new trial ordered.

HOOKER and MOORE, JJ., concurred with MONTGOMERY, J.

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## KOCK *v.* BOSTWICK.

FRAUDULENT CONVEYANCES—CHATTEL MORTGAGES—CORPORATIONS.

The fact that two chattel mortgages executed by an insolvent corporation to different persons were authorized by the board of directors at the same meeting, and given on the same day, does not constitute them parts of the same transaction, so that the fraudulency of one as to creditors vitiates the other.

Error to Wayne; Frazer, J. Submitted April 8, 1897. Decided May 28, 1897.

Replevin by Jacob Kock against Noble Bostwick. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

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*Bowen, Douglas & Whiting* (*Henry B. Graves*, of counsel), for appellant.

*Thomas Hislop* (*Barbour & Rexford* and *Hoyt Post*, of counsel), for appellee.

LONG, C. J. This is an action of replevin, brought by the plaintiff, claiming as chattel mortgagee, against the defendant, a constable of the city of Detroit, who seized the goods and chattels covered by the mortgage in hostility thereto by virtue of a writ of attachment issued out of justice's court at the suit of a creditor of the mortgagor.

The American Brass & Metal Works was a mercantile and manufacturing corporation organized under the laws of the State, with an authorized capital of $50,000, of which $34,230 was paid in. The plaintiff in this case, Jacob Kock, was its president, and owned a large amount of fully-paid-up capital stock. The corporation, on April 6, 1896, had assets, consisting of machinery, stock, and book accounts, which some time previously had been inventoried in the neighborhood of $60,000. On this date the corporation was indebted to the amount of about $42,000, made up as follows: About $20,225, borrowed of the Citizens' Savings Bank of Detroit, upon notes of the corporation, indorsed by the plaintiff as an accommodation; about $7,000 of customers' paper discounted by the corporation, and indorsed by the plaintiff as an accommodation; about $4,000 borrowed directly by the corporation from the plaintiff; about $11,000 of merchandise indebtedness. On April 6, 1896, also, the plaintiff owed his brother, Henry Kock, $2,000 for borrowed money.

On April 6, 1896, at the instance of the plaintiff and others, an emergency meeting of the board of directors of the corporation was called, which meeting the president attended, and almost the only business transacted was the authorization and direction by the board that the plaintiff, as president, should be secured by chattel mortgage for the amount of book account and all indorsed notes held by the Citizens' Savings Bank and otherwise, and that

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the corporation should purchase from Henry Kock 1,578 shares of its own stock for the sum of $15,500, and pay for the same by giving him the note of the corporation secured by a chattel mortgage upon its property. At the same time, Jacob Kock, the president, transferred 1,578 shares of his own stock to Henry Kock, who took it in payment for the $2,000 debt owed by the former to the latter, and thereupon, at the same time, the old certificates of stock were surrendered, and a new certificate issued on the books of the company for 1,578 shares to Henry Kock.

On April 18, 1896, in pursuance of the order of the board of directors made on April 6th, two chattel mortgages were executed by the president and secretary in the name of the corporation,—the first, for the sum of $31,100, to the president himself, to secure the indebtedness and liability recited above; and the other, subject to the first, to Henry Kock, for $15,500, to pay for the stock bought of him by the corporation. These mortgages were placed on record April 20, 1896, and the president and plaintiff in this case took possession under the first mortgage, running to him.

On May 21, 1896, Maurice Weil commenced suit by attachment in justice's court for a $500 merchandise claim against the American Brass & Metal Works; and the defendant, a constable, seized about $1,100 worth of metal belonging to the corporation, in hostility to the two mortgages. On May 23d the corporation executed a third chattel mortgage for $20,225 to the Citizens' Savings Bank of Detroit, securing the same notes for the indorsement of which the plaintiff was secured in the first chattel mortgage. Jacob Kock foreclosed his first mortgage under the power of sale, bid in the property himself for the sum of $23,750, and thereupon proceeded to replevin from the defendant the property held by him as attaching officer. All these three chattel mortgages covered all the property of every kind and nature owned by the American Brass & Metal Works.

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It is the contention of the defendant that he represents a creditor of the American Brass & Metal Works, who has secured a lien on the mortgaged property of the latter; and, thus being in a position to attack the first two mortgages, he has shown that they were made with the intent of hindering, delaying, and defrauding the creditors of the American Brass & Metal Works, under the provisions of 2 How. Stat. § 6203, and are therefore void as to him. In order to avoid both of these mortgages, the defendant insists that the second mortgage, made to Henry Kock, was grossly fraudulent, and its inception was so participated in by all parties to the first mortgage as to vitiate the latter; that both mortgages were parts of one transaction, and the fraud in the one tainted the whole. The circuit judge charged the jury that the second mortgage, given to Henry Kock, was fraudulent and void. The defendant contended, further, that the two mortgages constituted parts of one and the same transaction; that all the honest indebtedness owing to or for which the plaintiff was liable on account of the corporation was put in the first mortgage, and the second one was created and used to cover up the equity of redemption in the property so as to prevent redemption or bidding at the sale by unsecured creditors, and thus to permit the plaintiff to buy in the property himself with no surplus to account for. The trial court refused so to instruct the jury, and held that there was no such evidence, and stated to the jury:

"I will say to you that I consider these two mortgages as separate and distinct transactions under the evidence; but, even if they were the same transaction, or part of the same transaction, or so mingled together as to be part of the same transaction, or the same transaction, still I do not believe that one mortgage being fraudulent under the law of this State would vitiate or destroy the other."

It was conceded that the first mortgage was valid unless made invalid by the making of the second mortgage. It appears that the mortgages were given on the same day, and authorized by the board at the same meet-



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ing. This is the only evidence in the record upon which the claim is made that they were parts of one and the same transaction. The first mortgage was given to Jacob Kock, and the second to Henry Kock. It has been many times held in this State that a debtor may lawfully secure one creditor rather than another. *Sweetzer* v. *Mead*, 5 Mich. 110; *Olmstead* v. *Mattison*, 45 Mich. 617. And a security made to secure an honest debt will be good although the debtor may know that the effect will be to hinder and delay other creditors. *Jordan* v. *White*, 38 Mich. 253; *Warner* v. *Littlefield*, 89 Mich. 329.

In the case of *Hoey* v. *Pierron*, 67 Wis. 262, 270, the same question was raised as presented here; that is, that all the mortgages were executed at the same time, and, one of them being fraudulent and void, the others were tainted with the fraud. It was said:

"It is claimed, in effect, that, as the four mortgages were executed at the same time, they should be regarded as a part of the same transaction, and, as the $600 mortgage was void, they should all be regarded as fraudulent and void as to the mortgagor's creditors. But the invalidity of the note and mortgage of $600 was by reason of their being given for an insufficient consideration, to wit, the wife's services for her husband. That fact, of itself, did not establish any intent on the part of the mortgagor to hinder, delay, or defraud his creditors in giving either of the other mortgages."

The same rule was stated in *Crawford* v. *Neal*, 144 U. S. 585.

We think the court was not in error in saying that the giving of the two mortgages was not one and the same transaction, and in holding that the fact of the invalidity of the mortgage given to Henry Kock in no manner affected the rights of the plaintiff under his mortgage. We find no such facts and circumstances in the record as would raise a question of fact to be passed upon by the jury. The other questions in the case have been examined, and we find no reason to reverse the judgment.

The judgment must be affirmed.

The other Justices concurred.

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## BURROWS *v.* BROOKS.

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148 486

CONSTITUTIONAL LAW—EXEMPTIONS—LABOR DEBTS—CLASS LEGISLATION.

Section 1 of Act No. 14, Pub. Acts 1885 (3 How. Stat. § 1717*a*), limiting the right of exemption to the articles therein enumerated, not exceeding $500 in value, in cases where the execution is issued upon a judgment for personal labor, is invalid as class legislation, and as contravening section 1, art. 16, of the Constitution, which provides that the personal property of every resident of the State, to consist of such property as shall be designated by law, shall be exempted, to the amount of not less than $500, from sale on execution or other final process of any court, issued for the collection of *any debt*.

Error to Berrien; Coolidge, J. Submitted April 7, 1897. Decided May 28, 1897.

Replevin by Jasper Burrows against James Brooks. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

*James O'Hara*, for appellant.

*Gore & Harvey*, for appellee.

MOORE, J. Plaintiff is a drayman. Mr. McMullen obtained judgment against him for personal work and labor in justice's court. The defendant, who is a deputy sheriff, by virtue of an execution issued upon said judgment, levied upon a wagon belonging to and used by plaintiff in his business. The wagon levied upon, together with his team, harness, etc., used by him to carry on his business, did not exceed in value the sum of $250. Plaintiff, claiming that the wagon was exempt, demanded its return of the officer, and upon his refusal to return it brought replevin. On the trial the court refused

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to direct a verdict for plaintiff, but directed a verdict for defendant, on the ground that the wagon was not exempt, under section 1, Act No. 14, Pub. Acts 1885 (3 How. Stat. § 1717*a*). Plaintiff comes here on error.

The sole question in this case is whether the portion of Act No. 14, Pub. Acts 1885, relative to the exemption of personal property from levy and sale under executions issued upon judgments for labor debts, is valid or not. If it is, the judgment should be affirmed. If it is not, the judgment should be reversed, and a judgment entered here for plaintiff for nominal damages.

There can be no doubt that under subdivision 8, § 7686, 2 How. Stat., the wagon in question was exempt from levy and sale, unless it is made subject to levy by section 1, Act No. 14, Pub. Acts 1885, which reads as follows:

"That the following personal property only, not exceeding in value five hundred dollars, shall be exempt from levy and sale under any execution issued upon a judgment obtained in or before any competent court of this State for work, labor, or services, other than professional services, done or performed by any person: Spinning wheels, weaving looms with the apparatus, and stoves put up and kept for use in any dwelling house; cemeteries, tombs, and rights of burial, while in use as repositories of the dead; the library and school books of every individual and family, and all family pictures; one cow, and provisions and fuel for the comfortable subsistence of every person and family for one month; and household goods, furniture, and utensils."

By its terms, this section of the statute would unquestionably subject the property to levy and sale.

Article 16, § 1, of the Constitution, reads as follows:

"The personal property of every resident of this State, to consist of such property only as shall be designated by law, shall be exempted, to the amount of not less than five hundred dollars, from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of this Constitution."

When this constitutional provision was adopted, there was a general law upon the statute book, which has been

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and is substantially the same as the one now in existence. It provides as follows:

"The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: * * * The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars." 2 How. Stat. § 7686, subd. 8.

It will be noticed that the constitutional provision refers to the personal property of every resident of the State, which property, when designated by law, shall be exempt from sale on execution for the collection of any debt. It will also be noticed that the general exemption law complies with the constitutional requirements in all particulars. The act of 1885 does not exempt the property mentioned therein from levy and sale upon process issued for the collection of any debt, thus not meeting the constitutional requirement. The property mentioned in the act is exempt from levy and sale upon executions issued only upon judgments obtained "for work, labor, or services * * * done or performed by any person." When the provisions of the two statutes in relation to exemption are attempted to be enforced, it will be found that property is exempt from levy and sale under one act which is liable to levy and sale under the other. It would not be difficult to suppose a case where, by the application of both exemption laws, so little property would be left to the debtor as to wholly deprive him of the right of exemption guaranteed to him by the Constitution. Section 1, Act No. 14, Pub. Acts 1885, is class legislation (*Tuttle* v. *Strout*, 7 Minn. 465 [82 Am. Dec. 108]; *Coleman* v. *Ballandi*, 22 Minn. 144), and is contrary to the provisions of section 1, art. 16, of the Constitution.

It is said by counsel that the object and intent of this law is, like many upon our statute books, for the protection of laborers, as, for example, the law giving a

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lien to a mechanic for his work upon a chattel, a lien to a livery-stable keeper for the care of animals, etc., which have been held to be within the admitted powers of the legislature. All of these laws proceed upon the theory that the lienor has added to the value or contributed to the necessity of the thing upon which he has a lien, and to that extent has an interest in it, which he ought not to be made to surrender until his interest is satisfied; and none of these laws are in conflict with constitutional requirements. So, too, in relation to property not being exempt from levy and sale for the purchase price. The provision is found in the general law of exemptions, and applies to all persons, and proceeds upon the theory that the purchaser of property should not be allowed to get and retain the property of another and not pay for it. Wap. Homest. & Exemp. 335. In morals, if not in law, property does not belong to the purchaser until the interest of the seller in it is extinguished by paying him the purchase price. These principles do not apply to the provisions of the law of 1885. Under this constitutional provision, the power is given to the legislature to prescribe the *kind of property* which shall be exempt; but the Constitution itself speaks upon the question of what debts the exemption shall be good as against, and provides that such property as shall be prescribed by the legislature shall be exempt as against *all debts*, not debts of a *particular class*, or all debts except a particular class. See Thomp. Homest. & Exemp. § 16.

Judgment is reversed, and judgment entered here in favor of the plaintiff for six cents damages, and costs of both courts.

The other Justices concurred.

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## SULLIVAN v. ROSS' ESTATE.

1. JUDGMENT—RES JUDICATA—CLAIMS AGAINST ESTATES.
   The Supreme Court reversed a judgment in favor of one who had appealed to the circuit court from the disallowance by commissioners of his claim against a decedent's estate, for error in permitting a recovery upon an alleged oral contract, when, as was found, claimant's own evidence showed a contract in writing. Thereafter, permission to amend the pleadings so as to set up a breach of trust under the written contract was refused by the circuit judge, and *mandamus* to compel the allowance of the amendment was denied in the Supreme Court, without discussion of the merits. The claim sought to be so interposed was subsequently disallowed in the probate court, and an appeal was taken to the circuit. *Held*, that the effect of the previous decision was not to render the controversy *res judicata*, but merely to determine what should be the basis of the judgment, and that the denial of *mandamus* did not affect the issue.

2. ELECTION OF REMEDIES—MISTAKE.
   While it is true that a person is bound by an election between two inconsistent remedies, one having a meritorious claim, who mistakes his remedy, and attempts to enforce it in an inappropriate action, wherein no recovery can be had, is not precluded thereby from resorting to his proper remedy.

3. SAME—DECEPTION OF COURT—PUBLIC POLICY—ESTOPPEL.
   The prosecution of a claim against a decedent's estate for the purchase price of logs alleged to have been sold and delivered to decedent under an oral agreement, though carried on with knowledge that the claim as presented is unfounded, and with an intent to deceive the court by keeping it in ignorance of a written contract by which the relations of the parties are defined, will not, on grounds of public policy, estop the claimant from thereafter asserting his rights under the written contract, and from seeking a recovery based upon the breach of a trust thereby created. GRANT, C. J., dissenting.

4. ESTATES OF DECEDENTS—PRESENTATION OF CLAIMS—ACCOUNTING—EQUITY.
   A claim for an accounting against an estate on a contract

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creating a trust relation between claimant and decedent, where the transactions were all completed during decedent's lifetime, and were of such a character that, had he lived, the entire controversy could have been settled in a court of law, may be presented in probate court, without a resort to equity.

Error to Marquette; Stone, J. Submitted January 13, 1897; original opinion, for affirmance, June 7, 1897. Rehearing granted April 5, 1898; reargued June 7, 1898; final opinion, overruling the earlier one, September 20, 1898.

Thomas G. Sullivan presented a claim against the estate of James G. Ross, deceased. The claim was disallowed by the probate judge, and claimant appealed to the circuit court. From a judgment for defendant on verdict directed by the court, claimant brings error. Reversed.

The facts, merits, and contention involved in this suit are fully stated and discussed in an exhaustive opinion by Chief Justice MCGRATH in 98 Mich. 570, which was concurred in by the entire court. After that opinion was rendered, the claimant made a motion in the circuit court for leave to amend his claim, based upon the theory that Ross & Co. had violated the agreement of June 24th, and that "in the execution of the trust [created thereby] they did not exercise reasonable care, but, on the contrary, carelessly, negligently, and recklessly lost a portion of said logs, of the value of $40,000, and carelessly, negligently, and recklessly sawed the balance of said logs into lumber, whereby the lumber was worth $40,000 less than it would have been if said logs had been cut into lumber with reasonable care." Other matters are set up in the motion, but the above quotation states the principal claim. This motion was denied by the circuit court for the following reasons:

"(1) In the exercise of the discretion which the court has to grant amendments for the furtherance of justice, I

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do not think that the ends of justice would be promoted, nor the cause of justice encouraged, to continue this litigation. Further, it seems to me that the Supreme Court has disposed of the case upon the merits, and that claimant is not in a position to better his standing in this court by an amendment of his claim.

"(2) The claimant has elected his cause and remedy. He alleged and swore to a sale and delivery of these logs after the contract of June 24, 1884, was produced. He having pursued this remedy and course, the other is gone. Not only does the averment of a sale and delivery amount to a solemn admission of a fact, but the claimant's testimony, often repeated, estops him from taking the position which he now, by amendment, seeks to assume. This cannot be permitted where the party has a choice of remedies or courses to take. Parties are bound by their written admissions made in the progress of a case, and cannot be permitted to repudiate them at pleasure. The same rule applies with equal force to the horses and other property.

"(3) To grant this motion would be to allow the claimant to enlarge and change the case presented to the commissioners. The claim now proposed was never passed upon by the commissioners. They passed upon the question of a sale; not on the conduct of a trustee. This court has no original jurisdiction over claims against estates of deceased persons. Such cases must come on appeal from the probate court, and nothing can be tried in the circuit court that was not presented to the commissioners. I think that the Supreme Court of this State has gone far enough upon this branch of the case to warrant me in denying the motion on this ground."

Claimant then petitioned this court for the writ of *mandamus* to compel the circuit court to allow the amendment. An order to show cause was granted, and upon the hearing the relief prayed for was denied. No written opinion was filed. Claimant then filed the present claim in the probate court, setting up substantially the same claim that was made upon the motion for leave to amend in the circuit court. It was again disallowed by the probate court, and appeal taken to the circuit court, which directed a verdict and judgment for the defendant upon the ground that claimant was seeking a remedy utterly inconsistent with the remedy pursued in his former suit.

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*Moore & Moore* (*Ball & Ball* and *T. E. Tarsney*, of counsel), for appellant.

*Clark & Pearl* (*John D. Conely*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). The circuit court was right in directing a verdict for the defendant.

1. The question was *res judicata*. The questions presented to the circuit court upon a motion to amend are precisely the same as those now presented. The court denied the amendment, whereupon the claimant filed his petition for a *mandamus* in this court. The questions were fully argued in briefs and orally, and the writ was denied, and the same reasons are now presented against the order of the court that were then presented.

2. Claimant in the former suit chose his remedy, and the law does not now permit him to assert another. Counsel cite several cases in support of the rule, about which there is no dispute, that "a judgment given against a plaintiff on the single ground that he has mistaken his remedy or form of action is no bar to his subsequent suit brought in the proper form." But these authorities do not cover the present case. Claimant presented his claim in the probate court upon the basis that he had sold his interest in these logs to Ross & Co. as 9,000,000 feet and at $9 per 1,000. He was defeated, appealed to the circuit, where two trials were had. Whatever may be said about his knowledge of the contract of June 24th upon the hearing in the probate court and upon the first trial in the circuit, he had such knowledge upon the second trial, and still insisted upon a sale,—a claim for which we held there was not the slightest foundation. If upon that trial verdict had been against him, would he have been permitted to bring another suit, based upon the trust relation? If he had set forth his claim in two counts in the declaration, one based upon the contract of sale, and the other based upon a breach of trust under the contract of June 24th, the court would, upon motion, have compelled him

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to elect upon which count he would proceed. If he had elected, and been beaten upon the count so elected, would the court then permit him to bring suit upon the other count? Claimant stands in no better position than he would if he had put two such counts in his declaration. With full knowledge of all the facts, he deliberately chose his remedy, and put the estate to a very large expense in his attempt to sustain his claim. It is not a case of a mistake in the remedy, but a deliberate choice of remedies. The law does not permit litigants to thus play fast and loose, especially with the estates of dead men, but leaves them to lie upon the beds of their own making.

Judgment affirmed.

The other Justices concurred.

ON REHEARING.

MOORE, J. The questions involved in this case up to February, 1894, are fully stated in *Sullivan* v. *Ross' Estate*, 98 Mich. 570. A reference to that case will make it unnecessary to repeat what is there stated. The case was here again, and is reported at page 311, *ante*. A reference thereto as to the history of the case subsequent to the events stated in 98 Mich. 570, will avoid the necessity of repeating many of the details of the case here. It was claimed on the part of the appellant that the case was wrongly decided, and a rehearing was ordered.

In the former opinion, *ante*, it was held—*First*, that the question involved in the case was *res judicata; second*, that claimant in his former suit chose his remedy, and the law does not now permit him to assert another. Upon the rehearing, careful and able oral arguments were made, and additional briefs were filed. In deciding the case, it may be well to go more into detail as to the history of the litigation prior to the advent of the case in this court, and to consider what was decided in 98 Mich. 570. It is well to remember at the outset that the case originated in the probate court, where claimant presented sev-

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eral items which he sought to have allowed in his favor against the defendant estate. The principal item, and the one about which the principal controversy has arisen, was a claim for 9,000,000 feet of lumber, which he alleged was sold by an oral bargain to Mr. Ross, through one Connolly, his agent, for the sum of $81,000. He claimed there was due him from the estate, stated in round numbers, the sum of $70,000. The defendant admitted that Ross & Co. had received upwards of 7,000,000 feet of lumber belonging to plaintiff, but claimed that they made payments and advances to plaintiff to such an extent that not only they did not owe plaintiff anything, but plaintiff owed them upwards of $23,000. The estate denied that the lumber was sold by oral contract, and claimed that Ross & Co. received the lumber and disposed of it according to the terms of two written contracts made in the fall of 1883, supplemented by a written contract made in June, 1884. The claims of the parties were submitted by the trial judge to a jury, who returned a verdict in favor of the claimant, and in doing so must have found the oral contract to exist.

The opinion in 98 Mich. indicates clearly that the court were of the opinion that the written evidence made by the plaintiff himself was inconsistent with the existence of the oral contract, and was consistent only with the existence of the written contract. The judgment was reversed, and a new trial ordered. Up to this point it is clearly evident that the jury passed upon the relation of the parties upon the theory that the oral contract existed, and did not undertake to decide in whose favor the balance should be, or for what amount, upon the theory that the written contract was to control. It is also evident, as to this principal item, that it was presented to the probate court for a definite quantity of lumber, at a stated price, according to the terms of the alleged oral contract, and was not such an item as must be presented if it is to represent a claim for the lumber upon the theory that the transaction is to be controlled by the written con-

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tract. After this court decided that the written contract must control, and a new trial was ordered, claimant attempted to amend his claim so as to bring it within the contract this court said must control. The circuit judge declined to permit the amendment, for the reasons stated in the opinion, *ante*, and, upon an application for a *mandamus*, this court declined to interfere. No written opinion was filed, so the reasons for this action of the court cannot be determined here. It might well be said that the claim presented before the probate court and the issue there made was not the same as the one which would be presented if the amendment was allowed, and for that reason the application for a writ of *mandamus* was refused. I do not think it can be said that, because of the *mandamus* proceeding, the question is *res judicata*. Can it be said, because of the proceedings prior to the decision in 98 Mich., that the question is *res judicata?*

The plaintiff claimed a balance due growing out of the oral contract. The defendant claimed that the written contract should control, and that a balance was due it. The jury found in favor of the plaintiff. This court said they did wrong, because the written contract must control, and ordered a new trial. The plaintiff then sought to so frame the proceedings as to permit the case to be heard upon the theory that the written contract should control. He has not so far been able to do it. It is very clear that a dispute exists between the parties as to how much is due, and from whom, if the written contract is to control. It is equally clear that that question has never been passed upon by the court. The attitude of the plaintiff is:

"Large dealings existed between us. I claimed the oral contract should control. The court says I am wrong in the claim, and the written contract must control. Conceding it must control, defendant has had a large quantity of my lumber, for which it owes me a large sum of money; and as the defendant disputes my contention, and claims I owe it, the question should be submitted to the jury to decide."

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The decision in 98 Mich. decides which contract shall control, but I do not think either it or the case as tried in the circuit court has decided what the judgment should be upon the basis of the written contract. The pleadings were not in such a condition that the issue thus stated could be tried. There has been no trial upon the merits of the controversy between these parties. The plaintiff sought to recover upon an oral contract. He had no right of action upon that contract, because the court has said that no such contract existed. Can it be said that defendant shall not be required to account for the proceeds of seven or eight millions of feet of lumber, which it admits it had, because plaintiff claims that the transaction was evidenced by an oral contract, when the court finds that no such contract existed, but that a written one did? I think the situation is stated in *McLaughlin* v. *Austin*, 104 Mich. 489:

"No rule is better settled than the proposition that one having the choice of two inconsistent remedies is bound by an election, and that suit brought upon one precludes a subsequent resort to the other claim. Thus, one may waive a tort by bringing an action in *assumpsit*, or may lose his right to bring *assumpsit* by commencing an action for the wrong committed. One may sometimes rescind a contract, and assert title to property that he has parted with, or he may affirm the contract, but he cannot do both. Having elected by bringing an action upon one theory, he has no right afterwards to sue upon the other. *Thompson* v. *Howard*, 31 Mich. 312, and cases cited; *Brown* v. *Littlefield*, 11 Wend. 467, 1 Wend. 398; *Morris* v. *Rexford*, 18 N. Y. 557; *M'Elroy* v. *Mancius*, 13 Johns. 121; *Sanger* v. *Wood*, 3 Johns. Ch. 416. This rule is not inconsistent with the practice of bringing a second and different action where it appears that the plaintiff never had a right of action as first brought, and therefore could not have elected. There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions, upon which recovery could not be had. *Morris* v. *Robinson*, 3 Barn. & C. 196; *Peters* v. *Ballistier*, 3 Pick. 495; *Butler* v. *Hildreth*, 5 Metc. (Mass.) 49."

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See *Fifield* v. *Edwards*, 39 Mich. 264; *McKinney* v. *Curtiss*, 60 Mich. 611; *Farwell* v. *Myers*, 64 Mich. 234; 2 Black, Judgm. § 715; *Chaddock* v. *Tabor*, (Mich.) 72 N. W. 1093.

It is said in the earlier opinion, *ante*, that claimant in the former suit chose his remedy, and the law does not now permit him to assert another. It will appear from the authorities already cited that if, in choosing his remedy, he has made a mistake, and for that reason failed, he is not cut off from pursuing the right remedy. And I think that is just what appears here. It is said that Mr. Sullivan has deceived the court, that he attempted to assert a claim which did not exist, and for that reason, upon grounds of public policy, he ought not to be heard in court again. The testimony was conflicting in relation to the circumstances surrounding the execution of the written contract, but the court has already said that written admissions made by Mr. Sullivan indicate clearly that the written contract was to control the parties. The record shows that this contract could not for a time be found. Considerable time elapsed while these transactions were going on. We all know how fallible men are, and how prone they are to believe what it is to their interest to believe. But suppose it be conceded that Mr. Sullivan was untruthful, and knew he was, in giving his testimony; while that fact is to be condemned, and would affect his testimony in any subsequent trial, can it be said that he has no right to have this controversy settled by the courts? He says that there are a good many thousand dollars due him. If that is true, is it a sufficient reply to say, "Even if there is, you have attempted to deceive the court, and for that reason it will not listen to you, and the defendant may keep what it has?" It is more in accordance with my sense of justice to hold that a jury should be allowed to say upon the merits, with an issue framed according to the rulings of the court, which of these parties owes the other.

It is urged that the claim should not have been presented in probate court, but that the aid of a court of

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equity should be invoked. Many cases are cited in support of this proposition, among others the case of *Sullivan* v. *Ross' Estate*, 98 Mich. 570. I think, however, this case is easily distinguishable from the cases cited. The transactions in this case were all completed during the lifetime of Mr. Ross. The lumber has all been sold, and a money judgment will satisfy all proper claims. *Wheeler* v. *Arnold*, 30 Mich. 304. If Mr. Ross had lived, there would have been no difficulty in settling the entire controversy on the law side of the court. There is nothing in the law questions involved that cannot be taken care of upon the law side of the court. The plaintiff should have been allowed to go to the jury with his case.

The judgment is reversed, and a new trial ordered.

MONTGOMERY, HOOKER, and LONG, JJ., concurred with MOORE, J.

GRANT, C. J. (*dissenting*). A re-examination of the authorities and of the record has confirmed me in the correctness of our former opinion. Expressed in plain English language, the decision in 98 Mich. 570, rendered by Chief Justice MCGRATH, means that Mr. Sullivan presented a false claim to the court, knowing it to be false, and subjected the estate to great expense for the different trials of that suit. In order to recover now, he must take a position utterly inconsistent with the claim there made. As I read the authorities, when one has deliberately and intentionally planted his suit upon one theory, and that theory a false one, and known to be false, the law does not permit him in a subsequent suit to recover upon another theory. Besides, the present record shows that his present claim is utterly inconsistent with his conduct and acts, and is devoid of any justice or equity. On the undisputed evidence, he is heavily in debt to the Ross estate unless he can make out a claim for tort arising from the alleged loss of logs and careless sawing at the mill at Sault Ste. Marie. His own scale of the logs

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was 7,511,077 feet. He wrote Mr. Ross, stating this to be the correct amount, that it was not as large as was anticipated, and asked for a reduction in price. He tried to make a sale based upon this scale. He now claims there were 9,000,000 feet. The record shows that about 7,000,000 feet were sawed and sold, thus showing that there was but a small loss in any event. It seems to me that the law puts the seal of condemnation upon such a course of conduct, and that courts should put an end to it.

I think the former opinion should be affirmed.

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## BUSH v. DELANO.

1. WILLS—WITNESSES—INTEREST—CROSS-EXAMINATION.
   In the contest of a will, proponents' counsel, for the avowed purpose of showing the interest of one of the contestants, who was sworn as a witness, cross-examined her closely as to whether certain of the contestants had not professed a willingness in the probate court to withdraw from the contest. The witness had previously frankly admitted her ill feeling towards proponents. *Held*, that the examination was not competent for the purpose stated.

2. SAME.
   The inquiry, however, was made competent by contestants' placing in evidence a letter written by one of the proponents, in which the decision of the contestants previously mentioned to withdraw from the contest was asserted; it being proper to show that this was not a misstatement.

3. SAME—EVIDENCE.
   The extent to which a testator had aided or failed to aid his immediate relatives is a pertinent inquiry, where the will is contested on the grounds of incompetency and undue influence.



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4. SAME—MENTAL INCAPACITY—FORGETFULNESS.
While individual instances of forgetfulness on the part of a testator do not show mental incapacity to make a will, an instruction that forgetfulness has no tendency to prove a want of capacity is erroneous.

5. SAME—UNDUE INFLUENCE—BURDEN OF PROOF.
The rule that the burden of proving that a will was obtained by undue influence rests upon the contestants is qualified where the will was drawn by one named as legatee therein; the burden in such case being upon the proponents to show that the instrument was in all respects fair and honest, and expressed the will of the deceased.

6. SAME.
Undue influence in the procurement of a will need be established by a preponderance of the evidence only. *Maynard* v. *Vinton*, 59 Mich. 153, in so far as it implies that the proof must be inconsistent with any hypothesis but that of undue influence, disapproved.

7. SAME—STATE OF MIND—DECLARATIONS OF TESTATOR.
In so far as the testator's state of mind is material in the contest of a will for mental incapacity and undue influence, declarations by him to the effect that he intended to make provision by will for certain relatives are admissible; but not for the purpose of showing that undue influence was exerted over him by other legatees.

Error to Allegan; Padgham, J. Submitted February 11, 1897. Decided June 7, 1897.

Charles A. Bush and others presented for probate the will of William R. Delano, deceased. William Delano and others appealed to the circuit court from an order probating the will. From a judgment for proponents, contestants bring error. Reversed.

*Ed. J. Anderson* and *Osborn, Mills & Master*, for appellants.

*O. Tomlinson* and *C. R. Wilkes*, for appellees.

MONTGOMERY, J. Error is brought to review proceedings on the trial of an issue over the probate of the will of

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William R. Delano. The jury sustained the will, and contestants bring the case here on error. Deceased was a bachelor, 82 years of age, at the time of the execution of the will. His heirs at law were his brother and sister and the children of deceased brothers and sisters. William and John Delano were nephews, sons of a brother of the deceased. The contestants gave testimony tending to show loss of memory, and tending, as it was claimed, to show that deceased felt himself under obligations to his nephew William Delano more particularly. William was named as legatee in the will, he being given 100 acres of land, but subject to the payment of $15 an acre to other legatees. John was given a life estate in 60 acres of land, which was subject to the same charge of $15 an acre. It is claimed that this was all the life estate in the land was worth. There was testimony tending to show that William at one time had been a tenant of deceased, and that the deceased was a smoker, and that, shortly after he had visited the barn one night, it took fire, and burned, with all the crops belonging to William, from which he suffered, for him, a very severe loss; and testimony was offered tending to show that deceased had assured the wife of William that he intended to make up this loss to William. The circumstances, it is claimed, indicated that the fire was occasioned by the carelessness of deceased. It further appeared that the will was drawn by the brother of deceased, Luther Delano, one of the proponents here, who was made a residuary legatee, and who was also named legatee in specific bequests of considerable amount. The will was contested on the grounds of mental incompetency and undue influence. Both questions were submitted to the jury by the trial judge, and the questions which we are asked to review relate to alleged errors in the rejection of certain offered testimony, in the admission of certain testimony offered on behalf of proponents, and in the charge of the court. We shall discuss only such questions as are likely to arise on a new trial.

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On the cross-examination of Lillian Delano, a witness for the contestants, proponents' counsel asked her whether, on the occasion of the contest before the probate judge, certain of the contestants did not say that they were going to withdraw from the contest, and leave it to Luther Delano to say whether they ought not to have more than the will gave them. It appears that these parties are still contesting the will. The avowed purpose of this examination was to show the interest of the witness. But the witness frankly avowed her ill feeling towards proponents in answer to the first question asked, and we cannot escape the conclusion that the line of inquiry pressed was calculated to impress the jury with the view that the contestants thought of withdrawing their contest because of a want of confidence in their cause. For this purpose it was clearly inadmissible, and we think it should not have been admitted as affecting the interest of the witness. But there was a purpose for which it afterwards became competent testimony, and, if this were the only question in the case, we probably should not feel justified in reversing the case on this ground. Reference is made to it in view of a new trial. The purpose for which it was made competent was this: A letter written by Luther Delano, in which the decision of John and William to withdraw from the contest was asserted, was placed in evidence by contestants. This made it competent for the proponents to show that this was not a misstatement.

We think it was also competent for the contestants to show the extent to which deceased had aided or had failed to assist his nephews and nieces. It was a circumstance of slight importance, but the relations of deceased to his immediate relatives were all competent and pertinent facts.

We think none of the other questions relating to the admission of testimony are likely to arise on a new trial.

The court charged the jury, in response to proponents' request, as follows:

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"Now, I charge you that the fact that William R. Delano was forgetful, if it is a fact, and he knew that he was forgetful, would not of itself have a tendency to show that he was of unsound mind, or that he lacked mental capacity to make a valid will. It is necessary for the jury to find from the evidence in the case, in order to hold this will invalid, that William R. Delano, at the time of making the will, was of unsound mind; and the fact that he was old and physically infirm or forgetful would not of itself have any tendency to prove that he was of unsound mind."

We think this instruction went too far. It may be correct to say that individual instances of forgetfulness do not show mental incapacity; but to say that forgetfulness has no tendency to prove want of capacity is to hold that evidence of forgetfulness should not be received by the court. No one will contend but that some memory is necessary to enable a party to make a valid will. He must have sufficient memory to be able to keep in mind the nature and extent of his property and those who would be the natural objects of his bounty, and, if the evidence of his forgetfulness was such as to convince the jury that he lacked this mental capacity, it was enough to defeat the will.

The circuit judge charged the jury, in answer to the request of contestants:

"You are instructed that while the evidence that the will in question was drawn by Luther R. Delano, who was named as a legatee therein, does not of itself invalidate the will, it calls for satisfactory explanation, and imposes upon those who present the will for probate the burden of showing to your satisfaction that it was in all respects fair and honest, and expressed the wish and desire and will of William R. Delano."

This instruction seems to be supported by the weight of authority. *Yardley* v. *Cuthbertson*, 108 Pa. St. 395 (56 Am. Rep. 218); *Montague* v. *Allan's Ex'r*, 78 Va. 592 (49 Am. Rep. 384); *Brown* v. *Bell*, 58 Mich. 58. It is contended that this instruction is inconsistent with a further instruction which the judge gave on his own motion, that—

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"The burden of proof is upon the contestants to show that the making of the will was obtained by undue influence, and, in order to defeat the probate of a will of this kind, it must appear to your satisfaction by a preponderance of the evidence that undue influence was employed."

That this instruction was correct as an abstract proposition of law is conceded, but it is claimed that it was not applicable to this case. It clearly was not, unless it can be said that the previous instruction, relating specifically to the relation of Luther R. Delano to the making of the will, was a qualification of the general instruction. It is, at least, doubtful whether the jury would draw this inference.

But in the same connection a more patent error was committed, when the jury were told that—

"The influence, to vitiate this will, must have been such as to amount to force and coercion, destroying his free agency; and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are *inconsistent with any hypothesis but that of undue influence*, which cannot be presumed, and must be proved in connection with the will, and not with other things."

We think this instruction, so far as it requires that proof of the circumstances of the execution of the will shall be inconsistent with any hypothesis but that of undue influence, casts a burden upon the contestants in the case which the law does not impose upon them. This question was before the supreme court of Missouri, and distinctly ruled, in *Gay* v. *Gillilan*, 92 Mo. 250 (1 Am. St. Rep. 712); and this court has often held that any rule requiring any more than the weight of evidence is erroneous. *Ferris* v. *McQueen*, 94 Mich. 367; *Gumberg* v. *Treusch*, 103 Mich. 543. But it is said that the court followed the language adopted in the decision in *Maynard* v. *Vinton*, 59 Mich. 153 (60 Am. Rep. 276), and quoted in *Severance* v. *Severance*, 90 Mich. 417. It may properly be said, as contended by contestants' counsel, that the fact that the language quoted was employed

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in the decision of a case does not necessarily show that it was proper for the trial court to use the language in an instruction to a jury. But I go further, and say that in *Maynard* v. *Vinton* the language of the court stated an incorrect rule. It is not the rule that proof in a will case, in order to defeat the will, where the burden rests upon the contestants, need be of any greater force than to amount to a preponderance of the evidence. It need not exclude all other possible hypotheses than that undue influence was exerted. While the language employed in the case cited very naturally led the circuit judge to give this instruction, we are constrained to hold that it was error.

Some criticism is made on the instruction given by the trial judge relating to evidence which was offered tending to show a declaration by the deceased of an intention to make certain provision for his nephews John and William Delano. It may suffice to say that these declarations were not admissible for the purpose of showing the fact that undue influence was exerted. In so far as the *state of mind* of the testator was material in the inquiry as to whether undue influence was exerted, the declarations of deceased, showing his state of mind, were admissible upon that issue, as well as upon the issue of mental capacity. See *Beaubien* v. *Cicotte*, 12 Mich. 459; *Haines* v. *Hayden*, 95 Mich. 332, 346 (35 Am. St. Rep. 566); 27 Am. & Eng. Enc. Law, 505; *Harring* v. *Allen*, 25 Mich. 505, 508.

For the errors pointed out, the judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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## CANTON BRIDGE CO. *v.* CITY OF EATON RAPIDS.

CONTRACTS—SETTLEMENT—FRAUD—RESCISSION.

Plaintiff, a bridge manufacturing company, appointed a certain person as its agent to take orders for bridges, under a contract which gave to the agent an interest in the profits of each separate contract secured by him. Upon a settlement between the company and its agent, it directed the defendant to pay to the agent the price of a bridge erected by it, and the agent, in consideration thereof, gave to the plaintiff certain orders for money due on other contracts. Four days later plaintiff attempted to rescind the settlement on the ground of fraud, and notified defendant to that effect, and thereafter brought suit to recover the contract price for the bridge, which had been paid to the agent. It appeared upon the trial that the orders turned over to plaintiff under the settlement were not returned to the agent, and it was therefore *held* that plaintiff was not in a position to claim a rescission.

Error to Eaton; Smith, J. Submitted April 8, 1897. Decided June 7, 1897.

*Assumpsit* by the Canton Bridge Company against the city of Eaton Rapids to recover the contract price for the construction of a bridge. From a judgment for defendant, plaintiff brings error. Affirmed.

*John M. Corbin*, for appellant.

*C. O. Markham*, City Attorney, and *Huggett & Smith* (*H. F. Pennington*, of counsel), for appellee.

LONG, C. J. The plaintiff is a manufacturing corporation, organized under the laws of the State of Ohio. Prior to and at the date of December 22, 1892, the plaintiff had been engaged in the business of manufacturing and selling iron bridges. For some time prior to December 22, 1892, R. D. Wheaton had been associated with one J. C. Darst, of Chicago, Ill., under the name of R.

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D. Wheaton & Co., their business being that of contracting for iron bridges and iron work of that nature, and having some manufacturing firm, like the plaintiff, make the iron work on the specifications and drawings made by R. D. Wheaton & Co. On the 22d day of December, 1892, a contract was made between the plaintiff and R. D. Wheaton. This contract is set out in the former opinion, written by Mr. Justice MONTGOMERY. 107 Mich. 619. In pursuance of the provisions of this contract, the plaintiff purchased the one-half interest of J. C. Darst in the erection tools, office fixtures, etc., then in use by the firm of R. D. Wheaton & Co.; the contract not making it compulsory upon the plaintiff to purchase said interest unless it could be purchased at a reasonable price. In pursuance of this contract, various contracts were taken in the States of Michigan, Indiana, Illinois, and Wisconsin, among them being the contract for the bridge for the defendant, and under which it was built. February 14, 1894, the plaintiff having completed the bridge, the common council of the city of Eaton Rapids accepted it, with a recommendation by resolution that, owing to a disagreement between R. D. Wheaton & Co. and the Canton Bridge Company as to which was entitled to pay therefor, payment should be deferred until such time as the common council should learn to whom the same should be legally paid. This action was brought and was at issue June 6, 1894. The declaration and the bill of particulars allege that the plaintiff is the real principal, and that R. D. Wheaton was its agent in making this contract. The plea and notice deny this, and claim that R. D. Wheaton and the plaintiff were copartners, doing business under the firm name of R. D. Wheaton & Co.

On the former trial the court took the case away from the jury, holding that the plaintiff and R. D. Wheaton were copartners, and that the action should have been brought in the name of the copartnership. Upon appeal to this court, it was held that the plaintiff was the principal, and that R. D. Wheaton was the agent; that the

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contract and arrangement between the parties did not amount to a copartnership. On the new trial in the circuit court, the main controversy arose over the issue presented by the fourth clause in defendant's amended plea and notice: "That upon the 25th day of January, 1894, for a valuable consideration, the said plaintiff executed to R. D. Wheaton & Co. an order in writing, commanding the defendant to pay said R. D. Wheaton & Co. for the bridge mentioned in plaintiff's declaration," etc. This order is as follows:

"JACKSON, MICH., January 25, 1894.

"HONORABLE MAYOR AND COMMON COUNCIL, EATON RAPIDS, MICH.

"*Gentlemen:* When your bridge is erected and satisfactory, please pay R. D. Wheaton & Co. for same.

"Yours truly,

"THE CANTON BRIDGE COMPANY,

"By JOHN R. REED, Secretary and Treasurer."

Defendant claims that this order was given on a settlement absolute and final between the parties as to the uncompleted work, including the Eaton Rapids bridge. At the time this order was given, the iron for the bridge had just been shipped from Canton. On January 29th the plaintiff notified the defendant by wire not to pay Wheaton for the bridge, and on the same day wrote the defendant that the order of January 25th had been obtained by Wheaton under false pretenses, and that plaintiff's foreman had been instructed to go on and complete the bridge, and that Wheaton had no authority to collect any money upon such contract. Defendant thereafter took a bond of indemnity from Wheaton, and paid him in full for the bridge. The plaintiff claims that such settlement, made when the order of January 25th was given, was both conditional and fraudulent; that is, that such settlement was made as a partial one only, and was not to become operative unless Wheaton met Reed, the secretary and treasurer of the company, at Chicago, within a few days thereafter, and made a complete settlement of all the business done under the contract; and that such Jackson settle-

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ment was fraudulently obtained upon the part of Wheaton, in this: That Wheaton assigned to the plaintiff the remaining one-half of the "Sycamore job," so called (the other half having been formerly assigned to plaintiff), as a part of the Jackson settlement, and that it was subsequently discovered that such half so assigned at Jackson had been previously assigned to John C. Darst.

The plaintiff called Mr. Reed, who testified substantially that the Jackson settlement was subject to the conditions set forth above, and was procured by the fraudulent means stated. Defendant introduced testimony which tended to show that the settlement was final, and that no fraud induced it. This issue was submitted to the jury as follows:

"It is not disputed that the defendant has paid the amount due upon this contract to R. D. Wheaton, taking his bond. * * * Was the payment to Wheaton * * * authorized, and had he the right to collect and receive this money? This must depend upon what you may find the truth to be regarding the arrangement between the plaintiff and Mr. Wheaton at Jackson, on January 25, 1894. There is no dispute but that the plaintiff, on January 25, 1894, gave Mr. Wheaton an order to collect pay for this bridge when completed; and you are instructed that this order was in legal effect an assignment to Mr. Wheaton of the right to collect and receive pay, * * * unless, on account of fraud or mistake, you shall find that the order was improperly given, or that, after it had been given, it had been properly rescinded by the plaintiff, under such circumstances that the plaintiff would have the right to rescind."

Under this charge, the jury found for the defendant.

On the trial, while Mr. Reed was on the stand as a witness for plaintiff, he testified that he met Mr. Wheaton in Chicago, after the order on the defendant to pay Wheaton for the bridge; that he had found out then that the pay for half of the Sycamore bridge had been assigned to Darst, but had not yet been paid. He was asked on cross-examination if he had, when he came back from Sycamore, orders for the erection and payment of

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five or six unfinished bridges. He stated that he had. He was then asked if he had offered them to Mr. Wheaton. This was objected to as immaterial, and objection overruled. He answered that he had not offered them back to Mr. Wheaton. The court, in its charge, stated to the jury that it was the duty of the plaintiff to rescind the order immediately upon the discovery of the fraud, if any, and to put Wheaton back in his original position, by returning to him the orders received from him; and "if you find that the settlement was made as claimed by Mr. Wheaton, and the Canton Bridge Company has appropriated to itself the orders given it by Wheaton, and has never accounted to him for them, then it could not rescind the order given in this case to Wheaton, and your verdict should be no cause of action." Exception is taken to this portion of the charge, and error is assigned thereon.

It is contended by plaintiff that it was Wheaton's duty, under the contract, to either collect and pay himself, or allow all the money for these bridges to be paid over to the plaintiff; and that, in giving these orders, he did no more than it was his duty to do, as agent of the plaintiff, in carrying out his contract. The defendant contends (and the real defendant in this controversy is Mr. Wheaton) that a full and fair agreement was made at Jackson that Wheaton was to have the moneys coming for the erection of the bridge at Eaton Rapids; that to obtain this agreement, and in consideration of its being made, he surrendered the Sycamore contract; that the plaintiff company also had in its possession several other orders for the collection of moneys due on other jobs; that all the jobs were taken in the name of R. D. Wheaton & Co., and the orders assigned to the plaintiff. While the original contract between the parties did not make them partners, yet Wheaton's agency was coupled with an interest in each separate contract, of which he could not be divested by the arbitrary action of the plaintiff. The contract makes each contract taken a separate and

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distinct undertaking, in which each of the parties had an equal interest. If the contract was made at Jackson as claimed by Mr. Wheaton,—that is, without condition and without fraud,—certainly the court was not in error in saying that it could not be rescinded by plaintiff without return of the orders which it held from Wheaton, and putting him back in the same position as before the Jackson contract was made.

Some other questions are raised as to the admission and rejection of evidence. We find no error in them, and do not think them of sufficient importance to notice. The main issue in the case was fairly tried and submitted to the jury.

The judgment must be affirmed.

The other Justices concurred.

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## CAMPBELL *v.* WESTERN ELECTRIC CO.[1]

1. RES JUDICATA—PARTIES—SUPPLEMENTAL PROCEEDINGS.
   A decision on the hearing of a suit in equity, that the complainants are proper parties to the bill, renders the question *res judicata* in a supplemental proceeding by them in aid of execution based upon the decree in such suit.

2. EXECUTION—EXEMPTIONS—PROPERTY DEVOTED TO PUBLIC USE.
   The interest of a corporation in an electric plant, erected for the use of a city under a contract which has been declared void in a suit by taxpayers of the city for an accounting as to the moneys received thereunder, is not exempt from sale on execution issued upon the decree obtained in such suit, on the ground that such plant is devoted to public use.

Appeal from Wayne; Donovan, J. Submitted April 8, 1897. Decided June 7, 1897.

[1] Rehearing denied July 16, 1897.

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Bill in aid of execution by William Campbell and others against the Western Electric Company, impleaded with the city of Wyandotte. Defendant appeals from an order overruling its demurrer to the bill. Affirmed.

*Conely & Taylor*, for complainants.

*Charles W. Casgrain*, for defendant.

MONTGOMERY, J. Complainants, who are residents and citizens and taxpayers in the city of Wyandotte, filed their bill to have a contract made between the city and the Western Electric Company declared invalid, and to require that the moneys paid by the city to the Western Electric Company, amounting to $5,968, be repaid into the city treasury, and that no more money be paid to the electric company upon the contract. Upon the final submission of the case in this court, a decree in accordance with the prayer of the bill was entered. See *Campbell* v. *City of Wyandotte*, 105 Mich. 1. The Western Electric Company did not comply with the terms of the decree, and, on motion of complainants, and upon order of the court, a writ of *fieri facias* was issued, placed in the hands of the sheriff, and levied upon the plant, which had been delivered under the contract between the city and the Western Electric Company. This levy was perfected. The Western Electric Company continues to claim that the plant belongs to the city of Wyandotte. The bill sets out that—

"The defendant the city of Wyandotte has no right, title, interest, or claim in, to, or upon the machinery and apparatus aforesaid, unless it has some sort of a claim of an equitable nature for moneys expended in making a few additions which may have been required or may have appeared necessary in using such machinery and apparatus since the same came into the possession of the defendant the city of Wyandotte, and some claim of an equitable nature upon said machinery and apparatus as security for the repayment of the moneys so as aforesaid paid by the city of Wyandotte to the Western Electric Company."

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This bill is filed to have the rights of the respective defendants determined, and the rights of the city of Wyandotte in or to the property upon which the levy has been made defined, and asks that the property be sold, and the purchaser thereof given an absolute title, and the proceeds applied in satisfaction of the amounts due upon the decree and writ of execution, and that, if it be determined that the city of Wyandotte has an equitable lien upon the property, the proceeds of the property be used, so far as may be equitable and just, in the satisfaction and extinguishment of such lien. To the bill setting out these facts, the defendant the Western Electric Company demurred, on the grounds:

1. That the complainants do not appear to have any such interest in the matter as entitled them to bring their bill of complaint.
2. That it does not appear by the allegations contained in complainants' bill that they would be, either individually or collectively, injured by the action complained of in an amount sufficient to confer jurisdiction upon the court to hear and pass upon the matter.
3. The general ground that they have not made or stated a case entitling them to relief.

This demurrer was overruled, and from this order an appeal is taken by defendant.

As to the contention that the complainants have not shown themselves to have an interest in the decree, we think the ruling of the court on the hearing in the former case is *res judicata*. This proceeding is supplemental to that case. It was held that the complainants were proper parties to that proceeding, and, the court having taken jurisdiction of the matter, and based a decree upon a bill filed by these complainants, it would follow that they have the right to take proper proceedings for the enforcement of that decree.

The contention that the complainants have not shown themselves concerned in the matter in dispute to the extent of $100 is subject to the same considerations; and it may be added that it does not appear upon the face of the

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bill that the amount in controversy is less than $100. See *Bay City Bridge Co.* v. *Van Etten*, 36 Mich. 210. On the contrary, it does appear that costs were taxed in favor of complainants in the sum of $249.70.

It is further urged that, as an execution will not lie against a municipal corporation, on grounds of public policy, it should follow that the interest of a municipal corporation in property used for public purposes should not be held subject to levy and sale on execution, even under the circumstances of this case. It is said that the plant is charged with public uses, and it is essential, for reasons of public necessity, that these uses be not diverted or destroyed. But we think it would be carrying the rule of protection of property devoted to public use too far to hold that under the circumstances of this case the real interests of the Western Electric Company in this property cannot be subjected to a sale. To so hold would be, in effect, to hold that the court is powerless to carry into effect its own decrees. Indeed, the reluctance to observe the decree of the court is made altogether too manifest on this record.

An additional ground of error has been suggested in a supplemental brief, namely, that the bill fails to set up the return of the sheriff, and that there is no averment of a return of an execution unsatisfied for want of property upon which to make a levy. Counsel cites the case of *Studley* v. *Ann Arbor Savings Bank*, 112 Mich. 181. But this case is clearly distinguishable from that. The bill in this case does aver that a levy was made upon the property, and perfected, so far as the situation of the property permitted. This is not a judgment creditors' bill, but a bill in aid of execution.

The order overruling the demurrer is affirmed, and the case remanded. Complainants will recover costs.

The other Justices concurred.

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## CAMPBELL v. WESTERN ELECTRIC CO.[1]

RES JUDICATA—PARTIES—PROTECTION OF JUDGMENT.
Case ruled by *Campbell* v. *Western Electric Co.*, *ante*, 333.

Appeal from Wayne; Donovan, J. Submitted April 8, 1897. Decided June 7, 1897.

Bill by William Campbell and others against the Western Electric Company, impleaded with the city of Wyandotte and others, to set aside a judgment on the ground that it was obtained by fraud and collusion. Defendant appeals from an order overruling its demurrer to the bill. Affirmed.

*Conely & Taylor*, for complainants.

*Charles W. Casgrain*, for defendant.

MONTGOMERY, J. This case is a companion case to the case of the same title decided at the present term (*ante*, 333), in which a bill was filed in aid of execution by these complainants. The present bill sets out that, after the decree in the original case in the circuit court, in which the court decreed that the contract referred to in the case of *Campbell* v. *City of Wyandotte*, 105 Mich. 1, was void, and before that case was taken to this court, the Western Electric Company brought a suit in *assumpsit* in the circuit court of the United States for the Eastern district of Michigan against the city of Wyandotte; that the city attorney was directed to retain Dickinson, Thurber & Stevenson as counsel, the attorneys who, in the original suit, attempted to sustain the contract. Upon the trial of this case a verdict was rendered for the plaintiff for $5,968.50, being the amount of the balance due on the

[1] Rehearing denied July 16, 1897.

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contract, which, by the decree of the Wayne circuit court, had been declared invalid. On the 16th of April, 1894, a judgment was rendered on the verdict, and soon thereafter the money was paid. It is charged in the bill that this was the result of a fraudulent arrangement and conspiracy to secure a collusive judgment in favor of the defendant the Western Electric Company against the defendant the city of Wyandotte, entered into by the company and certain officers of the city. Defendant demurred to this bill, and from an order overruling the demurrer appeals.

The same considerations which control the case between the same parties determine this. The order overruling the demurrer is affirmed, and the case remanded. Complainants will recover costs.

The other Justices concurred.

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WEBB *v.* HOLT.

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1. DEEDS — INTRODUCTION IN EVIDENCE — PRELIMINARY PROOF — CERTIFICATE OF RECORD.

   Under 2 How. Stat. § 5685, making a certified transcript of the record of a deed sufficient proof of its execution and delivery, the original deed, with the certificate of record indorsed thereon, is admissible without preliminary proof.

2. BREACH OF WARRANTY—DAMAGES—COSTS IN EJECTMENT.

   In an action for breach of warranty in a deed, the taxable costs incurred by the plaintiff in defending an action of ejectment are properly included as a part of the damages, although they were not in fact taxed.

3. SAME—TITLE OF EJECTOR—EVIDENCE.

   The plaintiff may show in such action that the title under which he was ousted was not derived from himself.

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4. SAME—HARMLESS ERROR.

Where the recovery is limited to the amount paid for the premises, with interest thereon and costs, the admission of evidence as to improvements is not reversible error.

5. SAME—PARTIES—HUSBAND AND WIFE.

A wife, though she joins in her husband's deed, is not liable on a covenant of warranty therein, and need not be joined as defendant in an action for breach thereof.

Error to Muskegon; Russell, J. Submitted April 9, 1897. Decided June 7, 1897.

Covenant by Charles L. Webb against Henry H. Holt upon a warranty of title. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

*Henry H. Holt, in pro. per.* (*Jerome E. Turner*, of counsel.)

*Philip W. Niskern*, for appellee.

LONG, C. J. This is an action upon a covenant of warranty in a deed executed by the defendant and his wife to the plaintiff. The covenant is that "he is well seised of the above-granted premises in fee simple; that they are free from all incumbrances whatever; and that he will, and his heirs, executors, and administrators shall, warrant and defend the same against all lawful claims whatsoever." It appears that the plaintiff paid for the land the sum of $327.49. January 12, 1895, Francis W. Cook commenced an action of ejectment against the plaintiff and his wife to recover possession of the property in question, and on September 27th thereafter recovered judgment of ouster, with costs of suit. Soon after the suit was commenced, notice was served upon the defendant of that fact, and that he should come in and defend. This notice was served in time so that the defendant could have appeared in the case if he had so desired, but he refused to take charge of it. On the trial of the present

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case, the plaintiff produced his deed from the defendant in evidence, the proceedings in the case of Cook against Webb, the judgment in that case, and the amount of costs. For this he had judgment, under the direction of the court, amounting to $484.32.

1. Defendant contends that the court admitted the deed from defendant to the plaintiff in evidence without the same being properly proved. The specific objection was: "I object to it. I submit that the witness has not shown that he is sufficiently familiar with Mr. Holt's handwriting to make his testimony competent." It appeared that the deed was properly executed and acknowledged, and duly recorded in the office of the register of deeds. There is no force in the objection made. Under section 5685, 2 How. Stat., a certified transcript of the record of the deed is sufficient proof of the execution and delivery of it; and under *Lacey* v. *Davis*, 4 Mich. 140 (66 Am. Dec. 524), the record of the deed being entitled to be read in evidence, the original deed is also admissible without preliminary proof. The original deed here had indorsed upon it the certificate of the register that it was duly recorded. But, aside from this, we are satisfied that there was sufficient evidence of its execution by the defendant to admit of its being read in evidence.

2. It is contended that the court erred in allowing the costs in the ejectment suit as a part of the damages, as the costs had not been properly taxed. The plaintiff testified that he paid $4.50 costs for jury fee and one-half of the stenographer's fees, and also $48.10, taxed costs. The objection is that the costs had not been properly taxed, and not that the plaintiff had not been put to that amount of expense and costs in the trial of the ejectment case. The rule is well settled that in actions of this kind the plaintiff must be reimbursed for the loss sustained by the action of ejectment. This loss is made up by adding to the amount paid for the land the interest thereon from time of payment, and costs in the ejectment suit. In some of the States it is held that the costs may include reason-

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able fees of counsel, as well as those which are taxable. *Staats* v. *Ten Eyck's Ex'rs*, 3 Caines, 115 (2 Am. Dec. 254). As was said in *Stebbins* v. *Wolf*, 33 Kan. 765, in an action for breach of warranty in a deed, the measure of damages is the value of the land as agreed on at the time of the conveyance, with interest thereon, together with reasonable costs and expenses incurred in resisting eviction. See, also, *Williamson* v. *Williamson*, 71 Me. 442. But in the present case only taxable costs were allowed.

3. Error is assigned upon the ruling of the court in permitting the plaintiff to show that Cook did not obtain his title from the plaintiff. There is no suggestion how this action could in any manner prejudice the defendant, and it was proof proper to be made as showing that Cook did not derive title from the plaintiff.

4. Objection is made to the ruling of the court in permitting the plaintiff to testify to improvements made by him upon the property after he went into possession of the premises. It appears, however, that defendant was permitted in the cross-examination of the plaintiff to go into the question of rents and profits. This was under plaintiff's objection. Upon redirect examination plaintiff's counsel was permitted to show what improvements he had made upon the property. The whole question was foreign to the issue being tried. The plaintiff in the ejectment case had filed a claim for rents and profits, and the defendant, Holt, in this action was in no manner interested in that question. The recovery in this case was limited to the amount of money paid for the premises, with interest thereon and costs, so that the defendant was not injured by the admission of this testimony.

5. But one other question need be considered. It is insisted that, inasmuch as Catharine Holt, the wife of defendant, joined in the execution of the deed to the plaintiff, she should have been made a party to this suit. It has been many times held in this State that a wife is not

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liable upon a covenant in her husband's deed. *Carley* v. *Fox*, 38 Mich. 387; *Hovey* v. *Smith*, 22 Mich. 170.

The judgment must be affirmed.

The other Justices concurred.

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## SHAW *v.* TOWNSHIP OF SALINE.

1. BRIDGES—GRADED APPROACH—DUTY TO REPAIR.
   A graded approach to a bridge is a part thereof, and must be kept in reasonably safe condition by the corporation charged with the care of the bridge itself.

2. SAME—RAILINGS AND BARRIERS—TOWNSHIPS AND VILLAGES.
   Thus, under 1 How. Stat. § 2853, making it the duty of the township in which an incorporated village is located to build, control, and keep in repair all bridges within the village limits in highways established by authority other than that of the village itself, the township, and not the village, has the duty of erecting and maintaining the railings and barriers necessary to render a graded approach to such a bridge reasonably safe for public travel.

3. SAME—PERSONAL INJURIES—PROXIMATE CAUSE.
   The absence of side railings along the approach to a bridge is the proximate cause of an accident to one who, while driving in the usual track, without fault on his part, is precipitated over the embankment by reason of his horse's stumbling and becoming unmanageable.

4. APPEAL—ASSIGNMENTS OF ERROR—INSTRUCTIONS.
   Objections to portions of the charge upon which no error is assigned cannot be considered.

5. TRIAL—REQUESTS TO CHARGE—ORDER OF CONSIDERATION.
   A defendant has no absolute right to have the instructions preferred by him reserved until after those proposed by the plaintiff have been passed upon, the matter being entirely within the discretion of the court.

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Error to Washtenaw; Kinne, J. Submitted April 9, 1897. Decided June 7, 1897.

Case by Clifford R. Shaw against the township of Saline for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

*Frank E. Jones* and *Seth C. Randall*, for appellant.

*Lawrence & Butterfield*, for appellee.

MONTGOMERY, J. This action is brought by the plaintiff to recover damages arising from an injury received on the 24th of January, 1895, within the limits of the defendant township, the place at which the injury occurred being the immediate approach to the bridge over the Saline river. This bridge is within the corporate limits of the village of Saline. The bridge consists of a substantial iron structure, placed on stone abutments, 11 feet above the surface of the water. From the south end of the bridge proper, there is an embankment that extends south about 100 feet. At the south abutment of the bridge, the top of the embankment is 11 feet above the river. At a distance of 100 feet from the south end of the bridge, the approach is 18 feet wide, but as it approaches the bridge it becomes narrower, and next to the abutment it is 13 feet wide. The traveled part of the road near the south end of the bridge is 8 feet in width, and is 6 inches higher in the center than at the sides. From either side of the 8 feet the slope is much steeper. On the day in question, the plaintiff was driving a horse belonging to a neighbor, Mrs. Townsend, which she had requested the plaintiff to take to the village of Saline, and have shod. The horse was not shod behind, and had smooth shoes on the front feet. He was 18 or 19 years old, kind and gentle, and blind. The plaintiff had driven and worked the horse before. The road was at the time, as appears by the testimony, slippery and icy. In the center of the road the sleighing was not good, but

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on either side there was a narrow border of snow and ice. Plaintiff testified, however, that he was driving in the center of the road; that, as the horse came near the bridge, he slipped, and went sideways. The horse went down the embankment, throwing plaintiff over the embankment, inflicting very serious injuries. The defendant's theory—and there was some testimony tending to sustain it—was that the plaintiff was not keeping to the center of the road, but was on the outside, and that he was in fault in not keeping in the center of the road. Under the instructions which the court gave to the jury, however, it is quite evident that the jury found in accordance with the plaintiff's testimony upon the question of fact.

The principal questions raised on this writ of error are:

1. Was it incumbent upon defendant township to erect and maintain railings and barriers, even though the same were necessary, within the limits of the incorporated village of Saline?
2. Does the law making it incumbent upon the township to erect and maintain a bridge include the approaches?
3. Was the plaintiff guilty of such contributory negligence as would bar his recovery as a matter of law?
4. Was the absence of railings or barriers the proximate cause of the injury to plaintiff?

The general statute for the incorporation of villages, under which the village of Saline was, by the terms of its charter, acting, viz., 1 How. Stat. § 2853, confers supervision and control of public highways, bridges, streets, etc., upon the council, but contains this proviso:

"That the bridges within the limits of any village incorporated under this act, in the highways leading into or through said village which have been or shall hereafter be laid out by the commissioners of highways of the township or townships in which said village may be located, or established by any other lawful authority, except the authority of such village, shall be built, controlled, and kept in repair by the township or townships in which they may be located, the same as if said village were not incorporated."

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We think it evident that whether a railing was necessary in order to render the approach to this bridge reasonably safe for public travel was a question for the jury. *Malloy* v. *Township of Walker*, 77 Mich. 448; *Gage* v. *Railroad Co.*, 105 Mich. 335. This question was submitted to the jury, and the ruling was undoubtedly within the authorities above cited, if the approach to the bridge is to be treated as a part of the bridge within the meaning of the statute above referred to. We think it should be so treated. The condition of the highway before the approach was constructed would not permit a traveler to reach the bridge, and the fair construction of the statute requiring such bridges to be constructed by the highway authorities would include such construction as would make them passable, and make them available to the public. In the following cases the approaches to a bridge are held to constitute a part of the bridge: *Board of Com'rs of Rush Co.* v. *Rushville & Vienna Gravel-Road Co.*, 87 Ind. 505; *Whitcher* v. *City of Somerville*, 138 Mass. 455; *Driftwood Valley Turnpike Co.* v. *Board of Com'rs of Bartholomew Co.*, 72 Ind. 237. See, also, *Rex* v. *Inhabitants of West Riding*, 7 East, 588; *Com.* v. *Inhabitants of Deerfield*, 6 Allen, 449; *Tinkham* v. *Town of Stockbridge*, 64 Vt. 480.

Defendant's counsel insist that the condition of the highway was not the proximate cause of the accident. We are unable to agree with this contention. The instruction of the learned circuit judge upon this question was as follows:

"If you find from the evidence that this accident is due to the fact that plaintiff carelessly drove his horse outside the usual traveled track, and near the edge of the embankment, and that action on the part of the plaintiff caused the accident, then the plaintiff cannot recover. If, however, he kept his horse in the usual traveled track, and, without fault on his part, the horse slipped and stumbled and became unmanageable, then, if such action on the part of the horse contributed to the accident, the plaintiff cannot thereby be charged with contributory negligence."

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And in response to defendant's request he charged that:

"If the jury find from the evidence that the township was negligent in not causing railings or barriers to be erected, and shall also find that the plaintiff, by his negligence, and from the fact that the horse being driven by the plaintiff was blind, and not shod, and that he, by his want of care and attention to the horse, or voluntarily, strayed off the traveled or wrought portion of the road, and that the accident was thereby caused, then the plaintiff would not be entitled to recover."

In *Gage* v. *Railroad Co.*, 105 Mich. 335, the rule was approved that, if there be no fault on the part of the plaintiff, and the injury be the combined result of accident and the insufficiency of the road, the plaintiff may recover. The question of whether there was fault on the part of the plaintiff was in this case submitted to the jury.

The counsel discuss in their brief the instruction of the trial judge upon the subject of damages. But, as no error is assigned upon this in the record, we cannot consider the ruling.

We think no error was committed in the reception of testimony which worked any injury to defendant.

The only remaining question discussed in the briefs of counsel is whether it was error for the circuit judge to give the requests of defendant to the jury first, instead of giving the requests of plaintiff first. This is a novel proposition, and we think the suggestion that this court should undertake the control of the order in which topics should be presented to the jury wholly without merit.

The judgment will be affirmed.

The other Justices concurred.

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## MINKLEY *v.* TOWNSHIP OF SPRINGWELLS.

1. BRIDGES — DEFECTIVE RAILINGS — PERSONAL INJURIES — PROXIMATE CAUSE—LIABILITY OF TOWNSHIP.

   A township which permits the side railing of a bridge to become and remain out of repair is liable for injuries occasioned by its giving way and allowing a horse, which shies against it, to fall with the driver to the ground below, where the fright of the horse was due to the tipping of planks improperly nailed; but, if some object outside of the bridge was the proximate cause of the horse's taking fright, the township is not liable.

2. TRIAL—AMENDMENT OF DECLARATION.

   It is not error to permit the plaintiff to amend his declaration by adding a count thereto which sets forth no new cause of action, particularly where no claim of surprise is made by the defendant.

3. SAME—EVIDENCE—REOPENING CASE.

   It is within the discretion of the court to permit the plaintiff to reopen the case and introduce further direct testimony after the defendant has rested, although the practice is not approved.

Error to Wayne; Daboll, J., presiding. Submitted April 6, 1897. Decided June 7, 1897.

Case by Minnie A. Minkley against the township of Springwells for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

*F. W. A. Kurth* (*Samuel W. Burroughs*, of counsel), for appellant.

*Frank T. Lodge*, for appellee.

LONG, C. J. Plaintiff was injured March 1, 1893, by her horse shying, and going off the bridge over Roulo river, in defendant township. This action is for damages for injuries sustained thereby. Plaintiff is a married

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woman, living in Wayne. She and her husband, on the morning in question, started to drive from their home to the city of Detroit, in a sleigh drawn by one horse. The husband was a skillful driver, and the horse a steady one. The bridge in question is 98 feet long and 16 feet wide, and built of wood. It has railings upon either side, extending the whole length, as well as upon the approaches. The planks covering it are laid crosswise. The plaintiff's husband testified as to what took place when the parties reached the bridge substantially as follows:

"As I drove on the approach to the bridge, the plank kind of creaked, and seemed to be a little loose. It jumped up, and the horse sheered to one side. It tipped up just to one side. I think the horse's feet stepping on the plank made it tip. It seemed to jump, making a creaking noise. I didn't notice particularly, but it jumped four, five, or six inches; I couldn't say for sure. I noticed particularly the horse sheered at the same time. He sheered to one side; struck the railing. The railing went over, and we went with it. The side of the horse struck the railing."

It appears by the plaintiff's testimony that this railing was made of 2 by 6 uprights and inch boards. It was rotten at the bottom where it was fastened to the bridge, and, as plaintiff's husband says, had been rotten for more than a year, with dry rot, both at the bottom and at the top where the boards were fastened. The railing was from 3 to 3½ feet high. The witness further testified that he examined the planking of the bridge on the same day, and at the place where the horse shied. He found them "dozy" and loose. Several planks were in this condition. He further testified that the tipping or jumping up of the planks and the sqeaking of them made his horse start, and caused him to "sheer;" that he was driving on a walk, and driving carefully along. It appears that this railing was not braced, but was supported by the uprights, the strip of railing being from 24 to 26 feet long before reaching the truss. The bridge had been built about 20 years. Several witnesses were called by the defendant, who tes-

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tified that they had frequently traveled over the bridge, and noticed no loose planks, several of them going over it that same day. Some of the witnesses testified to a log's being in the creek some distance from the place where the horse went over, and some claim was made that the horse was frightened at this log; Dr. Clippert saying that plaintiff's husband told him on the same day that the horse took fright at some log or something at the side of the bridge. The overseer of highways testified that, two weeks before the accident, he examined the bridge, and saw nothing out of repair. The witness also testified that, three years before the accident, he had put in new planking all over it. After the defendant rested, plaintiff called a witness who testified that he drove over the bridge before March 1st, and saw that the planks were not spiked down; that they were badly worn and loose; that this was long before March; and that he drove over it again the February before.

At the close of the testimony, counsel for defendant submitted several requests to charge, and, upon the refusal of the court to give the third and fourth, error is assigned. They are as follows:

"3. If the plaintiff's driver knew that said bridge was unsafe, and that there were other safe roads to reach her destination, then she contributed to her injury, and verdict must be for defendant.

"4. If the defendant's officers, two weeks prior to the accident, used due diligence in ascertaining the condition of the bridge, and found no defects in the same, and no defects had been reported to it, then the verdict must be for the defendant."

There is no evidence in this record that the plaintiff's husband knew the bridge to be in a dangerous condition before going over it. Counsel for defendant, in their strictures upon the charge of the court upon the question of contributory negligence, say in their brief that the court was in error, because "there is no evidence in the record tending to show that plaintiff or her husband knew that * * * the bridge was in a dangerous condition. He

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simply said that, in passing over it some one, two, or three months before, he should judge it was in poor condition." In the light of the testimony and this concession of defendant's counsel, no further notice need be taken of this claim.

As to the fourth request to charge, the court, we think, sufficiently covered it in the general charge. The court said:

"It is claimed by the defense that it made an inspection of this bridge shortly before this; and, on the other hand, it is claimed that it did not. If it had made a reasonably diligent and fair inspection of this bridge within a week or so before this, using all reasonable efforts to ascertain if there was a rotten or weak space,—I am speaking now of the railing,—and had not been able to find it, then the defendant would be excused as to that particular branch of the case."

The proofs do not disclose that any examination whatever was made of this railing. The overseer of highways, who seems to have had this bridge in charge, under the direction of the highway commissioner, did visit the bridge, as he says, about two weeks before the accident; but he does not state that he made any examination of the railing, or just what particular examination he did make. It was not contended that the defendant had actual notice or knowledge that the bridge was defective or in bad condition; but the claim upon the trial was that the defects had existed for such a length of time that the defendant should have known its condition, and was negligent in not having ascertained its condition. We think there was ample evidence to support this contention.

Defendant asked the court to direct the verdict in favor of the defendant. This was properly refused. The question was very fairly and fully submitted to the jury as one of fact as to the negligence of the defendant. They were instructed that they were to find whether, from all the circumstances in the case, a railing was necessary, and, if so, whether it was sufficient under the circum-

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stances. In speaking of the frightening of the horse, the court said:

"It is claimed that the planks were loose, not properly spiked down; had become thin by wear, so that the horse, when he passed upon them, and his feet struck them as he passed along, disturbed them; they flew up or pointed up; that that made a noise or creaking, and that frightened the horse; that he then swerved or shied to the side, struck against the railing, and it, being too weak to stop him, gave way, and the horse and sleigh and its occupants were all precipitated to the ice or ground below. * * * If you find that the planks at this point were in good condition, the bridge safe, so far as that part is concerned, and the horse, by reason of some other object aside from the defective plank or flooring of the bridge, became frightened, and that was the proximate cause of his fright, and he then ran and broke through, and went upon the ground below, and the accident happened that way, the township would not be liable, because it is not liable for the fright of the horse at something besides the defect in the highway. * * * If, on the other hand, as I said before, he was frightened at something that the township should have kept in repair, and did not, or was obliged to keep in repair, then it would be."

This charge was a correct statement of the law. *Ross* v. *Township of Ionia*, 104 Mich. 325. The court further properly and fully charged the jury upon what would be constructive notice to the township of the defects claimed to have existed in the bridge. This charge was fully borne out by the evidence. The court therefore very properly refused to direct a verdict for the defendant.

We may pass over several of the claimed errors, as not based upon proper exceptions. But counsel contend that the court was in error in permitting counsel for plaintiff to amend his declaration by adding a new count. The only objection made was that "it is rather late, and gives defendant no time to consider it." No adjournment was asked, nor was any claim made of surprise. No new cause of action was introduced by the amendment. The court very properly permitted the amendment. *Edwards* v. *Village of Three Rivers*, 102 Mich. 153.

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The court permitted the plaintiff to reopen the case, and put in further testimony by one witness as to the condition of the bridge before the accident. While this practice is not approved, yet it was a matter within the discretion of the court, and the verdict cannot be set aside for that reason.

We have examined the other questions carefully, and find no error.

The judgment must be affirmed.

The other Justices concurred.

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## CLARK *v.* LOWE.

DEEDS — CONSIDERATION — ASSUMPTION OF INDEBTEDNESS — PAROL EVIDENCE.

A grantee under a deed by which he assumes, as a part of the consideration, the payment of one-third of the indebtedness of a certain business, may show by parol, in an action by him against his grantor to recover an excess of moneys so paid, that the debts which he assumed were agreed to amount to a certain sum, while in fact they exceeded it.

Error to Eaton; Smith, J. Submitted April 14, 1897. Decided June 7, 1897.

*Assumpsit* by Frank B. Clark against Egbert W. Lowe for moneys paid to defendant's use. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff and defendant exchanged real estate, and each executed to the other the proper deed of conveyance. In the deed from defendant to plaintiff the consideration was expressed at $3,000. The deed contained the following: "The said Frank B. Clark hereby assumes, in considera-

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tion herein set forth, and hereby agrees to pay, the undivided one-third of all debts, dues, and demands against said Sunfield Milling Company." The property conveyed by the defendant to plaintiff was a one-third interest in the flouring mill, a house and lot, and a one-third interest in the accounts of the Sunfield Milling Company, a copartnership of which defendant was a member. Plaintiff claimed and was permitted to show that the debts, one-third of which he assumed, were agreed at the time to be $1,420.25; that, in point of fact, they exceeded that amount; and that he paid the actual amount. He brought this suit to recover the excess so paid. He recovered a verdict of $116.14. No fraud is charged, but plaintiff gave evidence tending to show a mistake in two or three items, the principal one being that one debt was included in the statement at $2.67, while in fact it was $267.

*Garry C. Fox*, for appellant.

*McPeek, Jones & Dann*, for appellee.

GRANT, J. (*after stating the facts*). The defendant contends that the agreement was set forth in the deed, and that this agreement cannot be varied by parol. We think the case is ruled by *Bowker* v. *Johnson*, 17 Mich. 42, and *Ford* v. *Savage*, 111 Mich. 144.

The judgment is affirmed.

The other Justices concurred.



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## LANDIS *v.* LANDIS.

HUSBAND AND WIFE—MORTGAGES—FRAUD.

Complainants, heirs at law of defendant's deceased husband, filed a bill to revive a mortgage given by defendant to deceased, and alleged to have been fraudulently destroyed. Defendant admitted that she gave the mortgage as security for the payment of the purchase price of the lands covered thereby, but claimed that it was destroyed in the lifetime of the deceased, with his knowledge and consent. Deceased was shown to have been a man of weak intellect. The court found with the complainants, and declared the amount of the mortgage to be a lien upon the premises.

Appeal from Kent; Grove, J. Submitted April 16, 1897. Decided June 7, 1897.

Bill by Lorenzo Landis and others against Maggie Landis to annul a marriage, to set aside certain deeds, and to revive a mortgage alleged to have been fraudulently destroyed. From a decree dismissing the bill, complainants appeal. Reversed.

*Dwight Goss*, for complainants.

*Wylie & Clapperton* (*Dunham & Preston*, of counsel), for defendant.

LONG, C. J. The defendant, Maggie Landis, married one Samuel Landis in the year 1888. He was then 71 years of age, and she about 30. Samuel Landis had been married before, his wife dying in the year 1885. By the first marriage he had several children, who are the complainants here. The bill in this case is filed for several purposes:

1. To set aside and declare void the marriage between Samuel Landis and the defendant on the ground of fraud.

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2. To set aside several conveyances made by Samuel Landis to the defendant.

3. To revive a mortgage of $3,000 made by defendant to Samuel Landis.

The court below dismissed the bill, with costs against the complainants.

The bill sets up substantially that, when Samuel Landis married the defendant, he had property of about the value of $10,000; that after the death of his wife, in 1885, he became weak in mind; that the defendant married him to obtain his property and estate by undue influence and corrupt methods; that a deed of 40 acres was obtained by her by fraud and undue influence; that said deed conveyed only 20 acres, and afterwards was changed by defendant to include 40 acres; that the title to a house and lot in Grand Rapids was obtained by fraud and undue influence, as well as a deed of 80 acres of land which was conveyed by Samuel Landis to defendant. It is also contended that, at the time said deed to the 80 acres was made and delivered by Samuel Landis to defendant, a mortgage of $3,000 upon the same premises was made by her to Samuel Landis to secure the payment of part of the purchase money, and that she took the deed and mortgage, promising to have them both recorded in the office of the register of deeds; that she recorded the deed, but destroyed the mortgage. It is therefore sought by this bill to revive this mortgage. This deed and mortgage were given on September 19, 1891.

The court below, in determining the case, filed a written opinion, which is set out in the record. While we concur with that court in most of the conclusions reached, and think the marriage cannot be set aside, and that there is not sufficient evidence from which to find that the deed of the 40 acres was changed from 20 to 40, or that the deed to the 80 acres was fraudulently obtained, yet we are of the opinion that the mortgage of $3,000 upon the 80 acres was fraudulently destroyed, and that, by the undue influence which the defendant exercised over Samuel

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Landis in his lifetime, he was kept from asserting his rights thereunder. Defendant does not deny the execution of the mortgage, and that she destroyed it, but claims it was kept off the record under an understanding with Samuel Landis, and eventually destroyed with his knowledge and consent. Samuel Landis was a man of weak mind, and there can be no question that when the mortgage was executed it was the expectation of both parties that it should stand as security upon the 80 acres for the payment of the $3,000. We are led to believe, however, by the testimony, that he never consented to its destruction.

The decree below will be reversed. The proceedings will be certified to the court below, and further testimony taken, if necessary, to ascertain the time when the mortgage was to come due and the rate of interest; the amount of the $3,000, with interest, to be made a lien upon the premises from the date the mortgage was given, and such decree to stand in place of the mortgage, and to be recorded as such. Complainants will recover their costs of both courts.

The other Justices concurred.

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## MICHIGAN MUTUAL LIFE INSURANCE CO. *v.* MATHER.

APPEAL—DIRECTED VERDICT—REVIEW.

A judgment for the plaintiff upon verdict directed by the court will not be disturbed on appeal if his case at least entitled him to go to the jury, and the only assignment of error relates to the refusal of the court to direct a verdict for the defendant.

Error to Wayne; Carpenter, J. Submitted April 15, 1897. Decided June 7, 1897.

*Assumpsit* by the Michigan Mutual Life Insurance Company against Horatio N. Mather upon a promissory note. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

*Flowers, May & Moloney*, for appellant.

*Wilkinson & Post*, for appellee.

MOORE, J. Plaintiff sued the defendant to recover the amount due upon a promissory note. The defense interposed was that in December, 1890, the plaintiff issued to the defendant a policy of insurance upon which the premium for the ensuing year was $452.25; that the company accepted for said premium $113.05; and that a policy issued under such circumstances was void under the provisions of Act No. 171, Pub. Acts 1889; and that the note sued upon was given to renew a void policy, and was, therefore, without consideration. After the testimony was all in, defendant asked the court to direct a verdict in his favor. The court declined to do this, and directed a verdict in favor of the plaintiff. The defendant appeals, and makes but one assignment of error, to wit, "The court erred in refusing to direct a verdict for the defendant."

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The defendant introduced evidence tending to support his claim, as already stated. His cross-examination and the testimony offered by plaintiff tended to show two theories that would favor plaintiff's claim. One was that Mr. Mather was an insurance broker, and would be entitled to the usual commission upon his policy, given to agents, of 75 per cent. of the amount of the first premium, which would amount to just the difference between what he paid in cash and the premium that was due; and that his premium was paid by cash and an allowance of commissions. There was also testimony tending to show that there was a note given by Mr. Mather for the amount of the first premium originally.

Giving this record the most favorable construction possible for defendant, it left some questions to be determined by a jury, unless the plaintiff was entitled to have a verdict directed in its favor. The defendant was not entitled to have the jury instructed to render a verdict in his favor, and, as he took no exceptions to the charge of the judge, or his failure to submit the case to the jury, we cannot discuss those features of the case.

Judgment is affirmed.

The other Justices concurred.

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## MITCHELL v. CITY OF NEGAUNEE.

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1. MUNICIPAL CORPORATIONS — ELECTRIC LIGHTING — VALIDITY OF CONTRACT.

   In the absence of statutory restrictions, a municipal contract for electric lighting is not invalidated by the fact that the city has no money on hand, at the time the contract is made, which can lawfully be applied to such purpose.

2. SAME—SPECIAL ELECTION—CHARTERS.

   The city of Negaunee was authorized under its charter, and the provisions of Act No. 186, Pub. Acts 1891, as amended, to submit the question of acquiring an electric light plant to the electors at a special election.

3. SAME—VACANT LANDS—TAXATION.

   Vacant lands included within the corporate limits of a city, but so remote as to receive no benefit from the installation of a plant for electric lighting, are yet subject to taxation for the improvement, if the legislature, in the exercise of its discretionary authority to determine and establish taxing districts, makes no discrimination in their favor.

4. SAME.

   It is within the province of the legislature to confer upon municipalities, under proper restrictions, the right to install plants for municipal lighting and to furnish light to their citizens.

Appeal from Marquette; Stone, J. Submitted April 16, 1897. Decided June 7, 1897.

Bill by Samuel Mitchell and others against the city of Negaunee, the Arbuckle-Ryan Company, and the Ft. Wayne Electric Corporation, to restrain the carrying out of certain contracts for the establishment of an electric light plant. From a decree dismissing the bill, complainants appeal. Affirmed.

*Hayden & Young*, for complainants.

*F. A. Bell* (*Clark & Pearl*, of counsel), for defendant city.

*F. D. Mead*, for other defendants.

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MOORE, J. The city of Negaunee has a population of about 6,000 people. In 1896 it made a contract with the Arbuckle-Ryan Co. for a steam plant complete, for $3,474. At the same time it made a contract with the Ft. Wayne Electric Corporation for an electric plant complete, at a cost of $6,500. This proceeding is brought by the complainants, who are large taxpayers, to restrain the carrying out of these contracts. The circuit judge, after hearing the proofs in open court, dismissed the bill. Complainants appeal, assigning as grounds of their appeal:

1. The contracts were vitiated by the fraudulent conduct of the council, engineer, and the two contractors.
2. There was no money on hand in the treasury which could lawfully be applied to the purpose of installing an electric plant.
3. The electors could not authorize the installing of an electric plant at a special election.
4. The city of Negaunee has no power, and the legislature cannot confer upon it power, to tax lands which can receive no benefit, for the installation of an electric light plant to do municipal lighting, and to engage in the supplying of lights to private parties.

Taking these propositions up in the order in which they are presented, a careful examination of the record does not, in our judgment, establish any such fraud in relation to these contracts, or in the proceedings leading up to them, as would warrant a court in restraining the execution of them for that reason.

As to the proposition that there is no money on hand that can be applied to these contracts, there is no suggestion that there is any requirement in the charter, nor has any provision of law been called to our attention requiring, that the money shall be in the treasury before a contract of this kind can be entered upon. It is not necessary to discuss the claim that a sufficient amount of money arising from the liquor tax is now on hand, or will be in the treasury in time to meet the terms of the contracts.

This brings us to the next question. Can the electors

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authorize the installation of this plant at a special election? A special election was called, at which a large majority of the electors voted in favor of establishing the plant. If the question was one that could be submitted at a special election, it was properly submitted, carried, and canvassed. The circuit judge found that Act No. 186, Pub. Acts 1891, as amended, and the provisions of the charter, authorize the electors to provide for the installation of such a plant at a special election, when ordered in the manner in which the special election was held. We think he was right in his conclusion. *George* v. *Electric Light Co.*, 105 Mich. 1.

We now come to the important question in the case. Negaunee has been incorporated as a city a good many years. Lands of the complainants, which were unplatted, vacant, wild lands, were inside the corporation prior to 1891. In that year the area of the city was greatly extended by the provisions of an amended charter. At this time a still larger quantity of complainants' lands was included in the corporate limits. So far as the record discloses, no complaint has been made of this action until the filing of this bill. It is now claimed that the lands owned by the complainants which are not city lots, some of which are not improved, most of which are so remote as not to be benefited by electric lights, cannot be taxed to install a plant which is to be used not only to light the streets and alleys of the city, but also to furnish lights to private parties. It is urged that the right of taxation was never meant to be used to the detriment of the citizen, but for his benefit; that taxes can be imposed only for a public, and not a private, purpose. It is the contention that the taxing district in which the tax may be levied should be limited to the locality which is to be benefited by the expenditure of the tax, and that, as these lands will not be benefited by the installation of this plant, it is not right to tax the owners of them. Complainants say that neither the legislature nor the municipality can tax vacant lands for such purposes; citing a number of author-

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ities, and, among others, *Morford* v. *Unger*, 8 Iowa, 82; *Langworthy* v. *City of Dubuque*, 13 Iowa, 86; *O'Hare* v. *City of Dubuque*, 22 Iowa, 144; *Deeds* v. *Sanborn*, 26 Iowa, 419; *Deiman* v. *City of Ft. Madison*, 30 Iowa, 542; *City of Covington* v. *Southgate*, 15 B. Mon. 491; *Arbegust* v. *City of Louisville*, 2 Bush, 271.

The Iowa cases fully sustain the contention of counsel, but as long ago as *Merrill* v. *Humphrey*, 24 Mich. 170, Justice COOLEY, after quoting most of these cases, expressed a doubt as to whether they had not gone too far, and we now think they are clearly against the weight of authority. Cooley on Taxation (2d Ed., page 157) reads as follows:

"City boundaries having been extended so as to embrace the lands of parties who insisted that their premises were agricultural lands merely, and would receive no benefit from the city government, such parties sought the protection of the courts, and prayed for injunction to restrain the imposition upon them of any tax in excess of what they would have been chargeable with had the boundaries not been extended to embrace them. It is to be observed of such cases that the legislature, which alone had authority to determine and fix the proper bounds of the municipal divisions of the State, and also to establish the taxing districts, had proceeded to do so, and, in fixing the city boundaries without any provision for a discrimination in the taxation of property within them, had, in effect, determined that no such discrimination should or ought to be made. The whole subject was one committed by the Constitution exclusively to the judgment and discretion of the legislature, whose members, as in other cases of legislation, would make inquiry into the facts in their own way, and act upon their own reasons. No question could be made of the complete legislative jurisdiction over the case, and, if the action was unfair, and led to unequal and unjust consequences, it seems difficult to suggest any ground upon which it could be successfully assailed in the courts that would not warrant a judicial review of legislative action in every case in which parties complain of injustice and inequality. Nevertheless, in some cases the courts have considered themselves warranted in inquiring into the facts, in order to determine

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whether, in their judgment, the extension of municipal boundaries was fairly warranted; and, having reached the conclusion that it was not, and that the extension was made for the purpose of subjecting to taxation adjacent property that would not receive the benefits of municipal government, and was not in fact urban property, they have undertaken to protect the owners of property thus unfairly brought in against the unequal taxation to which the legislation would expose them. In doing this they have not assumed to nullify the legislative action in extending the municipal limits, but they have undertaken to modify and relieve against its consequences, and to do this upon the express ground that the motive which has influenced the legislation was not legitimate. As the point is stated in one case, it is the palpable perversion of the power to tax which justifies the judicial interference. Some of these decisions are made by very able judges, whose opinions are always entitled to the highest respect; but it seems difficult to harmonize them with the conceded principles governing the law of taxation, for (1) they do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public, but they leave the legislation to stand, and only interfere to qualify its effect, on the ground that it has been adopted on improper grounds, and will operate unequally. (2) This is done on an inquiry into the facts, and a substitution of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too, — the proper limits of city extension, — upon which persons are certain to differ widely, and where an inquiry into the facts after the judicial method of an examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or to make. This is certainly laying down a rule which cannot be applied generally, it being admitted that the judiciary has no general authority to correct the injustice of legislative action in matters of taxation; and the weight of authority clearly is that, as regards these cases, the determination of the legislature is conclusive."

This is undoubtedly according to the great weight of authority.

The inquiry naturally arises, can the legislature authorize municipalities to own electric lighting plants which

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shall furnish not only the lights needed by the municipality, but lights to its citizens? Act No. 186, Pub. Acts 1891, authorizes, in terms, certain municipalities to construct electric lighting plants. Act No. 139, Pub. Acts 1893, provides "that it shall be lawful for any city or incorporated village in this State, not having more than 8,000 inhabitants, which own and operate works for the purpose of supplying such city or village with electric light, and lighting their streets and other public places with electric light, to furnish and supply electric light to the inhabitants of such cities or villages, upon such terms and conditions as the common council may deem expedient." Act No. 41, Pub. Acts 1895, authorizes cities and villages not having more than 10,000 inhabitants to furnish lights to the citizens. These provisions will stand if furnishing electric lights is a public service. This question arose recently in Massachusetts. The house of representatives of that Commonwealth asked the opinion of the supreme court upon this question: Is the furnishing of electric lights a public service? The court replied in part as follows:

"We have no doubt that, if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants, and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. * * * The maintenance of public streets and buildings is a public service, and it may be reasonably necessary to light them, in order that the greatest public benefit may be obtained from using them. To say nothing of the usefulness of lighting streets as a means of promoting order and of affording protection to persons and property, the common convenience of the inhabitants may require that they be lighted. Cities and thickly-settled towns have for a long time been accustomed to light their public buildings and some of their streets at the public expense. If the streets and public buildings are to be lighted, the means is a matter of ex-

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pediency. If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient. As a question of constitutional power, we cannot distinguish the right to authorize cities and towns to buy gas or electricity for their use from the right to authorize them to manufacture it for their use. * * *

"The maintenance of sewers and drains is a public service. One object is the preservation of the public health; but, apart from this, they are of great convenience to the inhabitants whose estates can be drained by them. It is impracticable for every owner of land in cities and towns to construct and maintain sewers and drains exclusively on his own account. They cannot ordinarily be constructed over any considerable territory without using the public ways or exercising the right of eminent domain. They are, therefore, regarded as of common convenience, and are constructed at the public expense.

"The furnishing of water for cities and towns for domestic use affords, perhaps, the nearest analogy to the subject we are considering. It was long ago declared that 'the supply of a large number of inhabitants with pure water is a public purpose.' *Lumbard* v. *Stearns*, 4 Cush. 60. The statutes are well known which authorize cities and towns to maintain waterworks for supplying their inhabitants with water, and the constitutionality of these statutes has not been doubted. Water cannot ordinarily be supplied to a large city or town from ponds or streams without the exercise of the right of eminent domain and the use of the public ways. Every inhabitant needs water, and often the only practicable method of obtaining it is by the agency of corporations or of the municipality. The land for the public ways having been taken for a public use, it may be subjected to other public uses, but it cannot be subjected to strictly private uses without the consent of the owners of the fee when the fee remains in the abutters. There is, therefore, often a necessity of having water, common to the inhabitants of a community, which cannot well be met except by the exercise of public rights, and therefore the furnishing of water has been considered a public service. In the case of water, as in that of sewers and drains, a portion of the service is exclusively public, and the benefit to individuals cannot be separately estimated from that of the community; but a part of the service is rendered to individuals, and the benefit of this can

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be separately estimated. The inhabitants are, therefore, required to pay for the water furnished for their private use, and special assessments for the use of sewers and drains are laid upon estates specially benefited; and for the same reasons, while in laying out highways the expense is public, betterment assessments may be laid upon the owners of lands specially benefited.

"Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly-settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town that it incidentally benefits some individuals more than others, or that from the place of residence, or for other reasons, every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But, in general, it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them, and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them. If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think that the legislature can confer the power." Opinion of Justices, 150 Mass. 592.

See 2 Dill. Mun. Corp. § 692, note; *Rushville Gas Co.*

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v. *City of Rushville*, 121 Ind. 206 (16 Am. St. Rep. 388); *City of Crawfordsville* v. *Braden*, 130 Ind. 149 (30 Am. St. Rep. 214). In this case the recent authorities are referred to, and reviewed. *State* v. *City of Toledo*, 48 Ohio St. 112; Cooley, Tax'n (2d Ed.), p. 134.

It is conceded by counsel for complainants that municipalities may furnish water to their citizens. They seek to distinguish the right to furnish water from the right to furnish light by saying that water is a necessity for all, but that electric light is a luxury. It will hardly be contended that the necessities of modern life do not require light as well as water, and we think the reasoning of the cases cited shows conclusively that it is within the legislative province to confer upon municipalities the right to furnish both under proper restrictions.

The decree is affirmed, with costs.

The other Justices concurred.

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## PEOPLE v. WALKER.

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1. TRIAL—INFANTS AS WITNESSES—COMPETENCY.
   The matter of receiving children under 10 years of age as witnesses is by 3 How. Stat. § 7546*a*, made so far discretionary with the circuit court that its judgment in permitting a child of six years to testify upon its promise to tell the truth, elicited after a private examination in the judge's office, will not be interfered with, unless the abuse of discretion is clear.[1]

2. CRIMINAL LAW—RAPE—FELONIOUS ASSAULT—SEPARATE COUNTS.
   Under an information charging, in separate counts, rape and improper liberties with the person of a female child, where the evidence does not exclude either theory, the case may properly be submitted to the jury upon both counts.

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[1] The competency of children as witnesses is considered in a note to *State* v. *Michael*, (W. Va.) 19 L. R. A. 605.

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3. SAME—EVIDENCE—HARMLESS ERROR.

Upon a prosecution for taking improper liberties with the person of a female child six years of age, the admission of evidence that the complaining witness had stated that she had previously been subjected to similar treatment by another person, the accused having no connection therewith, is not prejudicial error.

Error to Ingham; Smith (Stearns F.), J., presiding. Submitted April 29, 1897. Decided June 7, 1897.

George J. Walker was convicted of taking improper liberties with the person of a female child, without intending to commit the crime of rape, and was sentenced to imprisonment in the state house of correction at Ionia for 18 months. Affirmed.

*Lawton T. Hemans*, for appellant.

*L. B. Gardner*, Prosecuting Attorney, for the people.

HOOKER, J. The defendant was convicted of the offense of taking indecent and improper liberties with the person of a female child, without committing or intending to commit the crime of rape, upon an information which contained a proper count charging such offense, and also a count for rape. The child was six years of age, and the only evidence supporting the charge was her unsworn statement, and the testimony of her mother, to whom she is said to have related the affair immediately after its occurrence.

Error is assigned upon the admission of the statement of the child. Previous to hearing her statement, the mother and child were taken by the judge into his private room for the purpose of ascertaining whether she had sufficient intelligence, and sense of obligation to tell the truth, to be safely permitted to testify, as provided by 3 How. Stat. § 7546*a*. On their return into court, the following dialogue occurred:

"*Examined by the Court: Q.* What are you going to do, Georgia, now? What did you go up in the chair for?

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Do you know? Can you tell? Can you tell now, or are you afraid? What was Dr. Root doing up there just a little while ago? Do you know what he was doing? Do you know what those men over there are there for? Can't you tell? Can't you tell how long you are going to stay down here today? Do you think you could talk to Mr. Gardner, if he would talk to you, better than you can to me?

"*A.* Yes.

"*Q.* Do you know Mr. Hemans,—that gentleman that sits over there beyond the table?

"*A.* Yes, ma'am.

"*Q.* Do you know what it means to tell the truth? Do you know that?

"*A.* Yes, ma'am.

"*Q.* What would happen to you if you did not tell the truth? What do you suppose would be the trouble? What do you think would happen to you if you should not tell the truth? Would it make any difference whether you told the truth or not? Do you know? (Nods her head, yes.)

"*Q.* Well, what would happen to you if you should not tell the truth? Would you be afraid to tell a lie? (Nods her head, no.)

"*Q.* Now, if Mr. Gardner should talk to you about something here, will you promise me to tell the truth?

"*A.* Yes, ma'am.

"*The Court:* I think you may examine her under the promise, not under oath; she is not competent.

"*Mr. Hemans:* I should like to interpose an objection to the statement of the child, as incompetent.

"*The Court:* Yes; but the statutes say, 'To its own satisfaction.' When the court has ascertained to its own satisfaction that such child has sufficient intelligence and sense of obligation to tell the truth, it would be safe to admit it to testify. I will say here it is a matter of very serious doubt, so far as the idea of testimony is concerned. It is received here more as showing a condition, or showing surroundings here; and I say to the jury that they may be very careful in their consideration of the matters, and pay attention and know what occurs, and the circumstances, and all about what appears before you here in the examination of this child. You may proceed, Mr. Gardner."



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The judge held that the child might testify, upon her promise to tell the truth. It is contended that this examination was not such as to warrant the judge in being satisfied of her sense of obligation to tell the truth. What occurred at the private examination, we do not know. From that, and the examination in court, the judge was satisfied; and we should not interfere with his discretion unless it is plain that he could not legally reach such conclusion, which we are unable to say.

We think it was proper to submit the case upon both counts, as the jury, if not satisfied that a rape was committed or intended, might, under the proof, find that a felonious assault was committed.

It was not material to this prosecution to show that the child had stated that she had previously been subjected to similar treatment by another person. Moreover, it was hearsay. But we can see no possible harm to the defendant in its admission, as he was not connected with the affair in any way.

The judgment is affirmed.

The other Justices concurred.

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## BRIGGS *v.* BRIGGS.

PAROL AGREEMENT TO CONVEY LAND—SPECIFIC PERFORMANCE.

A parol agreement by parents to convey to their son lands adjoining their own in consideration of his making his home thereon, and working and improving the same, may, if the son fulfills the conditions, be specifically enforced by his wife and children after his decease.

Appeal from Kent; Grove, J. Submitted April 29, 1897. Decided June 7, 1897.

Bill by Melissa M. Briggs and others against Spencer B. Briggs and Sarah A. Briggs for the specific performance of a verbal contract to convey land. From a decree for complainants, defendants appeal. Affirmed.

*Taggart, Knappen & Denison*, for complainants.

*Earle & Hyde*, for defendants.

LONG, C. J. This bill of complaint was filed in April, 1896, asking for the specific performance of a contract. The complainant Melissa M. Briggs is the widow, and Eva May Briggs the infant daughter, of Elias V. Briggs, deceased, and, through him, claim the right to a conveyance of an 80-acre farm in Solon township, Kent county, Mich., the legal title to one-half of which stands in the defendant Sarah A. Briggs, and the legal title to the other half in the defendant Spencer B. Briggs, who were the mother and father of the deceased, Elias V. Briggs. The bill alleges a gift of the premises, and an oral contract for the conveyance thereof, made by the defendants to Elias V. Briggs in his lifetime, followed by many years of possession, improvement, etc. The answer of the defendants denies any gift or contract, but alleges that the occupation by Elias V. Briggs and wife of the

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premises in question has been under other and different arrangements. Proofs were taken in open court, and the court found, upon the merits of the controversy, for the complainants. A decree for specific performance, in accordance with the prayer of the bill, was entered December 21, 1896. From this decree the defendants appeal.

Complainants' contention is that the defendants, Spencer B. and Sarah A. Briggs, husband and wife, had resided for many years in Solon township, and had considerable property; that their son Elias V. Briggs was married to the complainant, then Melissa Russell, on November 14, 1878; that he was then 21 years of age, and she was of the same age; that they resided until the next spring with the defendants as one family, but they both thought there was not land enough for all, and they planned to go away and start by themselves; that the father and mother objected to this, as they wished their son to remain with them or near them; that accordingly, on April 10, 1879, the defendant Sarah A. Briggs purchased two 40-acre parcels of land in the neighborhood, but not immediately adjacent to each other (another 40 intervening), for a home for her son and his wife; and that she and her husband agreed with them that the son and his wife should move upon the place so purchased, make it their home, and help improve it, pay off an existing incumbrance, remain in the neighborhood, where the father and son could work together, and that it should be their home, and should be conveyed absolutely to the son. Complainants contend that this agreement was carried out by the son and wife, who did move upon the property, and occupied it from that time until the death of Elias, which occurred November 2, 1895, such occupation having thus covered a period of 16½ years; that in 1886, however, it was agreed between all the parties that one of these 40-acre parcels, being the one upon which the dwelling and buildings were not situated, should be exchanged with a third person for a 40 adjacent to the home 40, so that there might be an entire 80-acre farm lying together

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as one parcel, and that the 40 so received in exchange should be substituted for the other in all respects, and should be conveyed, as it had been agreed the other should be conveyed, to Elias V. Briggs; that, in the making of this exchange, the defendant Spencer B. Briggs took the active part, and caused the deed for this last 40 so received to be made to him, instead of to his wife, so that, during the remainder of the life of Elias, his possession and occupation were of the entire 80 so constituting one farm, the legal title of one 40 standing in Spencer B. Briggs, and of the other 40 in Sarah A. Briggs; that it was continually understood by Elias and Melissa Briggs that the farm was theirs, and that they were entitled to a conveyance of it; that, under this understanding, they occupied and improved the farm, took part in erecting buildings and paying off the incumbrance, paid taxes, and in all respects treated the property as their own, and put into it in this way 16½ years of their labor; and that no trouble arose until after the death of Elias. The widow, after the death of Elias, continued to occupy the farm with her daughter, then nine years old. Her brother, William Russell, resided there with her, and worked the farm, under a lease which had been taken by him from Elias before the death of the latter. December 24, 1895, the defendants served upon the widow and her brother a notice to quit, claiming possession of the premises, and shortly afterwards commenced summary proceedings before a justice for their eviction. The bill in this cause was thereupon filed, the widow and her daughter claiming title through the contract with Elias V. Briggs, William Russell claiming a possessory right under his lease, and the Peninsular Trust Company being joined as administrator of the estate of Elias V. Briggs.

The defendants contend that, when Elias went on the land, he became a tenant of the mother; that the land was fully paid for, she paying for one 40, and the father for the other; that, when Elias went upon the premises, it was agreed between him and defendants that he could have

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all he could raise on the land if he would keep the same up in good shape, and pay all taxes thereon, and that, if he failed to do so, defendants were to have one-third of the crops to pay taxes and other expenses; and that the father was to furnish team and tools to work the land.

There was a large number of witnesses sworn in the case, but much of the testimony has no great bearing upon the main contention here. The contract set out in the bill is substantially as before stated. The whole controversy is one of fact. The defendants contend that the complainants' proofs do not support the contract, and that no such arrangement as claimed was ever made, but that, on the other hand, the arrangement as shown by the testimony is such as defendants contend for. The court below found with the complainants. He had the opportunity to see the witnesses, and judge of their fairness and candor. While this is not conclusive upon us, yet many times such fact has great weight, especially where there is great conflict of evidence. If the contract was entered into as claimed by complainants, it is certainly one which should be enforced.

The defendants had two sons, and no other children. These sons married sisters. At the time Elias married, he took his wife home to his father's house. His brother, Charles, and his wife were living there at that time. The talk became general that the defendants would buy a farm for Elias if he would move onto it. It was bought, and Charles' wife, as well as Melissa, testify that Elias was to have a deed of it. It appears by the testimony of many witnesses that the place was always called Elias'. He moved onto it, and apparently occupied it as his own. It is true that the father did many things there,—paid taxes, helped to put up the buildings and improve the farm; but all these acts are in keeping with the relationship between the parties. Charles and his wife lived at home. There were three 80's of land; and it is apparent to us that it was the intention of the defendants to give Elias this farm of 80 acres, and deed it to him; that he

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should have the title; and that Elias so understood it when he went into possession. No trouble seems to have arisen until after Elias died. Mr. Russell had gone on there as a tenant. He was the brother of the widow, and it is evident his presence there was distasteful to the defendants, and trouble arose. It would not profit to set out the testimony, as upon the whole case we agree with the court below. This class of contracts has been upheld by this court many times, and the citation of authorities is unnecessary.

The decree below must be affirmed, with costs of both courts.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. GRANT, J., did not sit.

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## LEMP v. RAVEN.

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RELIGIOUS SOCIETIES — SCHISM — CHURCH PROPERTY — RIGHT OF POSSESSION.

Where the constitution of a religious society provides that it shall not be altered except by request of two-thirds of the whole society, amendments involving substantial changes, proposed and adopted by the general conference otherwise than in accordance with the constitutional provision, are invalid, and those members, though a minority, who adhere to the original constitution, are entitled to the possession of the real estate belonging to such society. *Bear* v. *Heasley*, 98 Mich. 279, followed.

Appeal from Kent; Grove, J. Submitted April 30, 1897. Decided June 7, 1897.

Bill by Adam Lemp and others, trustees of the First Church of Sparta of the United Brethren in Christ, against Wallace J. Raven and others, to recover posses-

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sion of certain church property. From a decree dismissing the bill, complainants appeal. Reversed.

*Taggart, Wolcott & Ganson* (*Butterfield & Keeney*, of counsel), for complainants.

*Taggart, Knappen & Denison* and *W. B. Williams*, for defendants.

LONG, C. J. The bill in this case alleges, substantially, that the complainants were duly elected trustees of the church; that a church was erected in Sparta in 1875, and a parsonage in 1880; that the defendants, in November, 1891, by force, broke into the church, removed the lock therefrom, and since such date have so retained the property; that in 1892 the defendants took forcible possession of the parsonage of said church, and have continuously held possession thereof; that such action is illegal and void.

The case is on all fours with that of *Bear* v. *Heasley*, 98 Mich. 279, and must be ruled by it. That case was fully argued in this court, and after the decision a motion for rehearing was made upon briefs covering many pages, by eminent counsel. The rehearing was denied. We are now asked to open up the whole controversy settled there, and make a different ruling. No new facts are shown. The record in this case is like the former one. The court below, not being governed by the rule in *Bear* v. *Heasley*, entered a decree in favor of defendants, from which complainants now appeal. We gave the parties to this controversy a full hearing upon oral argument, but are unable to agree with them, or see any reason now for overruling *Bear* v. *Heasley*. That case settled the law of this State, whatever the courts of other States may hold.

The decree of the court below must be reversed, and a decree entered here in accordance with the prayer of the bill, with costs of both courts in favor of complainants.

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HOOKER and MOORE, JJ., concurred with LONG, C. J. MONTGOMERY, J., did not sit.

GRANT, J. (*concurring*). I agree with my brother, the CHIEF JUSTICE, that the issues in this case are identical with those in *Bear* v. *Heasley*, 98 Mich. 279, and that the decree in this case cannot be sustained without overruling that case. While I find no occasion to modify my views of this unfortunate church controversy as expressed in that case, I concur in the opinion that the question is *stare decisis*, and should not be overruled unless the justices concurring in the majority opinion should so decide. For this reason I concur in the reversal of the case.

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## PERKINS v. TOWNSHIP OF DELAWARE.

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| 142 | *339 |

1. BRIDGES—PLAN OF CONSTRUCTION—NEGLIGENCE.
   A township is not negligent in constructing a bridge 20 feet long with one end a foot higher than the other, to conform to the formation of the adjacent land.
2. SAME.
   The construction of a bridge 16 feet wide, 1 inch lower on one side than on the other, is not negligence.
3. SAME—EVIDENCE.
   In an action against a township for damages alleged to have been sustained by reason of its negligence in permitting the supports of a bridge to become rotten, so that one side was lower than the other, the testimony of the highway commissioner that an actual measurement showed an incline of one inch, if unimpeached, must prevail as against the testimony of witnesses who confessedly rely upon estimates in placing the incline at several inches.
4. SAME—SIDE RAILINGS—WHEN REQUIRED—QUESTION FOR JURY.
   Whether the failure to maintain side railings on a bridge 20 feet long and 16 feet wide, one end of which was 1 foot

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lower and one side 1 inch lower than the other, constituted negligence, is a question for the jury.

5. SAME—CONTRIBUTORY NEGLIGENCE.

Whether the owner of a horse, in permitting it to be driven unshod when the roads were slippery because of recent rains, was guilty of contributory negligence, precluding a recovery for damages resulting from its inability to keep its footing upon an inclined highway and bridge, which was unprotected by barriers, was a question for the jury, as was also the question of the negligence of the driver in not alighting before attempting to drive up the incline.

Error to Sanilac; Beach, J. Submitted April 30, 1897. Decided June 7, 1897.

Case by Henry P. Perkins against the township of Delaware for damages alleged to have been sustained by reason of a defective bridge. From a judgment for plaintiff, defendant brings error. Reversed.

The negligence charged in this case is the construction of a bridge across a ravine, with the north end thereof 1 foot lower than the south end, thus creating an incline of about 1 foot in 20; in permitting the supports to the bridge to become rotten, so that the east side was lower than the west side; and in failing to provide railings for the sides. The declaration alleges that, "while said horse and buggy were on said bridge, said horse, by reason of said incline as aforesaid, unavoidably slipped, and in his struggles to recover himself, and without fault of the driver, backed off and over the bridge on the east side into the ravine, a distance of 10 feet." The horse was killed, and the buggy injured. Plaintiff recovered verdict and judgment.

*William H. Burgess* and *H. O. Babcock*, for appellant.

*John F. Murphy* (*W. T. Bope*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). The defendant requested the court to direct a verdict for it. The case

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was left to the jury upon the theory that there was evidence to sustain the three grounds of negligence alleged. There was a steep hill at the south end of the bridge, and that end was constructed higher than the other, to conform to the formation of the land. There was no negligence in this method of construction, and the court should have eliminated it from the consideration of the jury.

Plaintiff's son, 14 years of age, was driving. His mother was riding with him. The evidence on the part of the plaintiff that the bridge sagged on the east side is as follows: Plaintiff's son testified that the bridge at the northeast corner "sagged down a little;" another witness, that he observed that the east side was eight inches lower than the west side; another estimated that it was from four to six inches lower. Several witnesses on the part of the defendant testified that they could not observe any sag, and that there was no depression which could be observed with the eye. The highway commissioner made a measurement, and testified that at the north end there was an incline to the east of one inch. There is nothing in the record to impeach this actual measurement, and it must stand as true. The practice of permitting juries to base their verdicts upon guesses or estimates of distances or conditions which are susceptible of actual measurement is to be condemned. It is the duty of the plaintiff who seeks to recover damages for negligence to place before the jury the actual conditions when it is within his power to do so. The construction of a bridge 16 feet wide, 1 inch lower upon one side than upon the other, is not negligence. This charge of negligence should have been eliminated from the consideration of the jury.

Only the charge as to railings remains. Under the decisions of this court, it was a question for the jury to determine whether the failure to maintain railings was negligence. *Shaw* v. *Township of Saline*, *ante*, 342, and authorities there cited.

It is difficult to ascertain from the testimony precisely

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how the accident occurred. Mrs. Perkins testified that the horse slipped about in the middle of the bridge; that her son struck the horse with the whip, "but he still slipped, and the heft of the buggy dragged him over the bridge." She further testified that the boy jumped before the horse and buggy went over, and that the hind part of the rig went over first. On cross-examination she testified that when the boy struck the horse "he started ahead quick, tried to get his feet, and got ahead, but we were too close, and we went over." The son testified, "When we got on the bridge, and got about to the center, the horse started to slip, and I hit him with the whip, and he slipped more and more, and the bridge was on an incline, and the buggy pulled the horse over the bridge." He also testified that when he hit the horse the second time "his front feet were off the bridge, going up the hill; his hind feet were yet on the bridge; then he slipped, and went to one side." Another witness for the plaintiff testified that he saw where the horse slipped in the middle of the bridge, and where he tried to walk up the hill, probably four or five feet from the bridge. It had been raining the night before, and plaintiff's horse was unshod. There were several steep hills in the road, the soil of which was clay. They had been made slippery by the rain. The hill which they had passed a short distance before coming to the hill and bridge where the accident occurred was so slippery that the horse could not pull the load up, and Mrs. Perkins got out and walked. One Joseph Mabie, a witness for the plaintiff, testified that the hill was so slippery he did not consider it safe to ride up in his buggy, and that he got out and walked up. Plaintiff himself testified: "I knew these hills were there, and if I had stopped to think I would have known that they would be slippery a morning like that. But I didn't think anything about it." There was some clay upon the bridge according to several of the witnesses, evidently washed upon it from the hill by the rain, or carried on by horses and carriages. For this condition of the

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road the defendant is not responsible. *Rolf* v. *City of Greenville*, 102 Mich. 544. We think that it was a question for the jury to determine whether the plaintiff was guilty of contributory negligence in permitting his unshod horse to be driven over the road, and whether the driver was negligent in attempting to drive over the bridge and up the hill with the occupants in the buggy.

Reversed, and new trial ordered.

The other Justices concurred.

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## WYNKOOP *v.* GRAND TRAVERSE CIRCUIT JUDGE.

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1. TAXES—SALE OF DELINQUENT LANDS—AFFIDAVIT OF PUBLICATION—EFFECT OF FAILURE TO SIGN.

   The affidavit of publication of the auditor general's petition for the sale of lands delinquent for taxes, and of the order of hearing thereon, required by Act No. 206, Pub. Acts 1893, § 66, to be filed in the office of the county clerk before any final order is made, is valid if properly sworn to before a notary, whose attestation appears thereon, though not signed by the affiant.

2. SAME—OMISSIONS—HOW CURED.

   The affidavit is not rendered invalid by the omission to state that the newspaper in which the publication was made is "circulated" in the county where the delinquent lands are situated, if that fact clearly appears from the petition and order themselves, and from the certificate of the auditor general designating such paper for making the publication.

*Mandamus* by Mary A. Wynkoop to compel Roscoe L. Corbett, circuit judge of Grand Traverse county, to set aside a decree for the sale of land for delinquent taxes. Submitted May 4, 1897. Writ denied June 7, 1897.

*Underwood & Umlor*, for relator.

*Tweddle & Cross*, for respondent.

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MOORE, J. The relator asks for a writ of *mandamus* to compel the judge of the Grand Traverse circuit court to set aside a decree entered October 13, 1894, for sale of lands delinquent for taxes of 1892. The return of the circuit judge shows that on the 18th of August, 1894, the auditor general filed a petition, pursuant to Act No. 206, Pub. Acts 1893, for the sale of lands delinquent for taxes of said year and previous years. Upon the filing of said petition, an order was made by the circuit judge substantially in the form prescribed by said act, and said order, petition, and list of lands delinquent for taxes were duly published in the Grand Traverse Herald, said paper having been duly designated by the auditor general. At the time of the hearing, there was filed with the clerk of the court a paper reading as follows:

"Thomas T. Bates, publisher of the Grand Traverse Herald, a weekly newspaper printed and published in Traverse City, Grand Traverse county, Mich., being duly sworn, says that the notice, a copy of which is hereto annexed, has been published in said Grand Traverse Herald once in each week for four (five publications) successive weeks, commencing August 30, 1894, and ending September 27, 1894. _____.

"Sworn and subscribed the 29th day of September, 1894, before me.

"MABEL BATES,

"Notary Public in and for Grand Traverse County."

Attached to this paper was a copy of the petition of the auditor general and the order of the circuit judge. It is now claimed that this affidavit did not confer jurisdiction upon the court to render a decree in the tax proceedings—*First*, because it is not signed; *second*, because it does not state that the Grand Traverse Herald is a paper circulated in the county of Grand Traverse, where the lands are situated; *third*, because it does not state that the order of the court and the petition of the auditor general were ever published as the law requires.

With reference to the objection to the affidavit that it is not signed, it is said, "The better practice requires that

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an affidavit should be signed by the affiant, in order to more readily identify him; but, in the absence of some positive statute or rule of court, this is generally not necessary." 1 Enc. Pl. & Prac. 315, and many cases cited. The effect of a lack of signature has been discussed in a number of cases before this court, and it has been held that, if properly sworn to, an affidavit is valid, though not signed by the affiant. *People, ex rel. Dickinson*, v. *Simondson*, 25 Mich. 113; *Merrick* v. *Mayhue*, 40 Mich. 196; *Bloomingdale* v. *Chittenden*, 75 Mich. 305. The provision of the statute in relation to the proof of the publication of the order and petition is as follows: "Proof of the publication of the order and petition herein required shall be filed in the office of the county clerk before any final order is made." The statute also provides that "any person familiar with the facts may make an affidavit as to the publication required." Act No. 206, Pub. Acts 1893, § 66. We do not think the failure to sign the affidavit made it void.

The return of the circuit judge shows that on the 10th of July, 1894, a certificate of designation of the newspaper in which the order of the circuit judge and the petition of the auditor general were to be published was duly filed in the office of the county clerk of said county by the auditor general, which certificate is in the words and figures following:

"The Circuit Court for the County of Grand Traverse, in Chancery.

"In the Matter of the Petition of the State of Michigan for the Sale of Certain Lands for the Taxes Assessed Thereon for the Year 1892 and Previous Years.

"I hereby certify that on the 20th day of June I designated the Grand Traverse Herald, published at Traverse City, in said county of Grand Traverse, a newspaper published and circulated in said county of Grand Traverse, as the newspaper in which the order and petition in the above-entitled cause are to be published, together with the descriptions of lands assessed in said year and years (and which said lands are delinquent for the taxes of said

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year or years), and that such designation was accepted by the publisher of said Grand Traverse Herald on the 21st day of June, 1894.

"STANLEY W. TURNER,
"Auditor General.

"Dated at Lansing, June 23, 1894."

I think it is clearly shown from this certificate, taken in connection with the order of the circuit judge, the petition of the auditor general, and the affidavit of the publisher of the Grand Traverse Herald, that the Grand Traverse Herald is a paper published and circulated in the county of Grand Traverse, where said lands are situated. *Dexter* v. *Cranston*, 41 Mich. 448; *Muirhead* v. *Sands*, 111 Mich. 487.

The circuit judge was of the opinion that the relator had failed to show any such irregularity in the proceedings as would authorize him to set aside the decree rendered by him in October, 1894. We think he was right in his conclusions.

The writ is denied.

The other Justices concurred.

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## HOME SAVINGS BANK *v.* WAYNE CIRCUIT JUDGE.

1. ESTATES OF DECEDENTS—APPEAL FROM DISALLOWANCE OF CLAIM—NOTICE—HOW GIVEN.

   Notice of appeal by a creditor of a decedent's estate from the disallowance of his claim by the commissioners need not, under 2 How. Stat. § 5910, providing for notice of such appeal in such manner as the probate judge shall direct, be served on other creditors of the estate, unless the probate judge so directs.

2. SAME—BOND ON APPEAL—OBLIGEES.

   The bond required by 2 How. Stat. § 5908, to be given to the "adverse party" on an appeal from the disallowance by the commissioners of a claim against a decedent's estate, properly runs to the administrator, and not to other creditors who contest the claim.

*Mandamus* by the Home Savings Bank and the Preston National Bank of Detroit to compel Willard M. Lillibridge, circuit judge of Wayne county, to permit the relators to intervene in a certain cause for the purpose of moving to set aside the judgment therein. Submitted May 18, 1897. Writ denied June 7, 1897.

*George W. Radford* and *Julian G. Dickinson*, for relators.

*Sidney T. Miller*, for respondent.

MOORE, J. March 10, 1897, a judgment for $9,260 was rendered in favor of Augustus P. Thompson, as executor of the estate of Matilda C. Thompson, against the estate of J. Huff Jones. Soon thereafter the relators moved to set aside said judgment, for reasons therein stated. On the hearing of the motion, by consent of counsel and the court, it was treated as a motion for leave to intervene for the purpose of making a motion to set aside said judg-



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ment, and the motion was denied. The relators now ask that a *mandamus* issue to compel the circuit judge to grant said motion.

The record shows that the relators are creditors of the estate of J. Huff Jones in a large amount, and that the estate is probably insolvent; that Mrs. Thompson, in her lifetime, presented a claim against said estate to the commissioners on claims. Before the claim was acted upon, she died, and Mr. Thompson was appointed her executor. Upon the hearing, the claim was disallowed by the commissioners. October 22, 1895, Mr. Thompson appealed from the action of the commissioners to the circuit court. The judge of probate directed him to give a bond to the executors, and to give them notice of the appeal, which he did. The claim of Mrs. Thompson was contested by the relators, and their attorneys had knowledge that the appeal had been taken, though no notice of appeal had been served upon them; but at no time before making this motion did they ask to be allowed to intervene or to take charge of the litigation. They ask now to be allowed to do so for the following reasons:

1. Because they were never notified of the appeal, or of the trial of said cause.
2. Because the judgment was rendered upon a stipulation made by the attorneys for the claimant and the attorneys for the estate, without notice to the relators, and without giving them an opportunity to contest the claim.
3. Because the bond and notice were not given to the adverse parties.
4. Because said judgment, appeal, and proceedings were collusive and a fraud upon the creditors.

As to the first of these reasons, I think the record shows clearly that, while the probate judge did not require notice of the appeal to be served upon the relators, they, in fact, had notice that an appeal had been taken.

As to the second reason, the return of the judge shows that the judgment was not based upon a stipulation of counsel, but upon proofs taken in court; it appearing from the books of Mr. Jones, as shown by an expert (agreed

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upon by all the parties in interest as a proper person to examine the books), who examined them, that Mr. Jones was indebted to the claimant for money that had been intrusted to him to invest from time to time, which amount, with interest added, was the amount for which judgment was rendered.

As to the third reason, the bond and notice of appeal were given as directed by the probate judge. 2 How. Stat. §§ 5908, 5910. They were given to the proper parties. *Daniels* v. *Stevens*, 60 Mich. 219.

As to the claim that the proceedings were collusive and a fraud upon the creditors, there are but two things that tend in the slightest to show that this is true. One of these is that the claim of Mrs. Thompson was disallowed before the commissioners, and the other is the affidavit of Mr. Pitts that "he believes that the said claim is invalid, and that it can be defeated, and that it should be." The record shows that Mr. Post, one of the commissioners on claims, stated that the reason why the commissioners rejected the claim was because it was not made to appear affirmatively before the commissioners that Mrs. Thompson had not received any of the money that was shown by the books to be due her. This proof was supplied before Judge Lillibridge. The affidavit of Mr. Pitts does not undertake to show what are the facts in relation to the dealings between Mrs. Thompson and Mr. Jones. It gives simply the conclusion of the affiant, and could not be treated as a basis for granting a new trial in a case. The circuit judge returns that there was nothing in the showing made before him which gave him any reason to think the judgment was procured by collusion, or, if it was vacated and the relators were allowed to intervene, that any different result would be reached in a new trial. From a careful inspection of all the papers filed, we think he was fully justified in his conclusion.

The application for *mandamus* is denied.

LONG, C. J., MONTGOMERY and HOOKER, JJ., concurred. GRANT, J., did not sit.

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## ATTORNEY GENERAL *v.* COMMON COUNCIL OF DETROIT.

1. TAXES—EXEMPTIONS—TELEPHONE COMPANIES.

   The property of telephone companies organized under Act No. 129, Pub. Acts 1883 (3 How. Stat. chap. 102*a*), is exempt from local taxation, it being declared by section 8 of the act that such companies shall be subject to taxation in accordance with Act No. 168, Pub. Acts 1881 (1 How. Stat. § 1237 *et seq.*), which provides for a general tax, the rate of which is to be determined by a state board, "in lieu of all other taxes, state and local."

2. SAME—MUSICAL SOCIETIES.

   The real estate of musical societies incorported under Act No. 128, Sess. Laws 1857 (1 How. Stat. chap. 149), is by section 8 of the act expressly made subject to taxation the same as other real estate, and hence it does not come within subdivision 4 of section 7, Act No. 206, Pub. Acts 1893, providing that such real estate as shall be owned and occupied by library, benevolent, charitable, educational, and scientific institutions shall be exempt while occupied solely for the purposes for which they were incorporated.

3. SAME — BENEVOLENT AND EDUCATIONAL ASSOCIATIONS — WHAT CONSTITUTE.

   It is not enough, in order to render an association exempt from taxation under the last-mentioned provision, that one of its direct or indirect purposes or results is benevolence, charity, education, or the promotion of science, but it must be organized chiefly, if not solely, for one or more of these objects.

*Mandamus* by Fred A. Maynard, Attorney General, to compel the common council of the city of Detroit, sitting as a board of review, to place the property of certain corporations upon the assessment rolls for taxation. Submitted June 1, 1897. Writ granted June 7, 1897.

*James H. Pound* and *Alfred J. Murphy*, for relator.

*Charles D. Joslyn* and *H. H. Hatch*, for respondent.

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PER CURIAM. The board of assessors of the city of Detroit assessed the property, real and personal, of the Masonic Temple Association, at the sum of $169,000, of the Harmonie Society at $47,700, of the Arbeiter Society at the sum of $13,340, and of the Detroit Telephone Company at the sum of $250,000. The common council, sitting as a board of review, held that the property of the Masonic Temple Association and that of the Harmonie Society were exempt from taxation under subdivision 4 of section 7, Act No. 206, Pub. Acts 1893, which reads as follows:

"Such real estate as shall be owned and occupied by library, benevolent, charitable, educational, and scientific institutions incorporated under the laws of this State, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated: *Provided*, that such exemption shall not apply to fraternal or secret societies, but all charitable homes of such societies shall be exempt."

They reduced the valuation of the property of the Arbeiter Society two-thirds, and of the Detroit Telephone Company to $25,000. The object of this suit is to determine the validity of this action of the council.

1. The property of the Detroit Telephone Company is by law exempt from local taxation. By the act of incorporation (section 8 of Act No. 129, Pub. Acts 1883; 3 How. Stat. § 3718*h*), telephone companies are made subject to taxation in accordance with Act No. 168, Pub. Acts 1881. By this act these companies are required to make a report annually to the auditor general, and the auditor general, state treasurer, and commissioner of the land office are constituted a board to determine the rate of tax to be levied, "which tax shall be in lieu of all other taxes, state and local, and shall be payable to the state treasurer." It follows that the action of the council in assessing this property for local taxation is void.

2. The real estate of the Harmonie Society is not exempt from taxation. 1 How. Stat. § 4471, especially

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provides that the real estate of such associations is subject to be taxed as other real estate.

3. The property of the Masonic Temple Association, the Harmonie Society, and the Arbeiter Society is not exempt from taxation. They do not come within subdivision 4 of section 7 of Act No. 206, above quoted. It is not enough, in order to exempt such associations from taxation, that one of the direct or indirect purposes or results is benevolence, charity, education, or the promotion of science. They must be organized chiefly, if not solely, for one or more of these objects.

The writ of *mandamus* will issue in accordance with this opinion.

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# JUNE TERM, 1897.

## JACKSON *v.* LEECH'S ESTATE.[1]

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h184 [3]490
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e140 [1] 20
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145 [*]709
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146 [2]354
113 391
152 [3]125

1. EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNT—AMENDMENT IN CIRCUIT COURT

An executor's final account, as presented for settlement in probate court, may, in furtherance of justice, be amended in the circuit court on appeal by adding omitted items.

2. SAME—CHARGES—TOMBSTONE.

The price paid for a suitable tombstone for a decedent is a proper charge in the executor's final account.[2]

3. SAME—ATTORNEY'S FEES—WHEN ALLOWED.

Under 2 How. Stat. § 5958, providing that an executor or administrator shall be allowed "all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides, together with all extra expenses," reasonable attorney's fees for services actually and necessarily rendered by counsel in the settlement of the estate, although yet unpaid by the executor, are properly allowed to him in his final account. HOOKER and GRANT, JJ., dissenting.

Error to Wayne; Simpson, J., presiding. Submitted November 13, 1896. Decided June 28, 1897.

Abram Jackson appealed from an order of the probate court charging him with a large sum in addition to the items of indebtedness shown in his final account as executor of the last will and testament of Rachel M. Leech, deceased. In the circuit court he was allowed to add certain items of credit, and from the judgment thereafter rendered the estate brings error. Affirmed.

[1] Rehearing denied November 23, 1897.

[2] The liability of a decedent's estate for funeral expenses is considered at length in a note to *Fogg* v. *Holbrook*, (Me.) 33 L. R. A. 660.



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*Thomas S. Jerome*, for appellant.

*Rowland M. Connor* (*John D. Conely* and *C. K. Latham*, of counsel), for appellee.

HOOKER, J. (*dissenting*). This case is an appeal from the allowance of certain items in an executor's account. The disputed items consist of a debit of $1,000 cash received upon an insurance policy, which he had failed to include in the inventory, and five credits, as follows:

| | |
|---|---|
| Attorney fees to John D. Conely | $400 |
| Paid for tombstone | 250 |
| Paid E. W. Leech for services | 300 |
| Paid expenses of E. W. Leech | 50 |
| Paid repairing sidewalk and cleaning snow | 20 |

None of these items appeared in the account as filed in probate court, which account was filed by Jackson upon a citation, after his removal as executor, and the appointment of the Union Trust Company administrator with the will annexed, at the instance of one Burrows, a creditor. Upon the hearing the probate court surcharged the executor with a large sum additional to the items stated in his account, which sum was made up of the life-insurance money received, with interest, and a claim for *devastavit*, in that he, in confederacy with Mr. Leech, the husband of the testatrix, had destroyed the value of her holding of stock in a lumber company, and made an order fixing his indebtedness to the estate at the sum of $4,000, from which order Jackson, the executor, appealed to the circuit court.

Upon the trial in the circuit court it was claimed that the executor was an uneducated man, a resident of Canada, and that the business of the estate was carried on through Mr. Leech, and that the money received upon the insurance policy was inadvertently omitted from the inventory under a misunderstanding between the executor and his counsel who prepared the inventory, and that in fact this money was all used in payment of expenses of the estate which were not included among the credits

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stated in the account, and application was made for leave to amend the account by adding the items mentioned, which was granted, and the case proceeded upon the theory that it was amended. It is said that this amendment is unlawful, it being contended that the circuit court could not pass upon items not considered by the probate court; and counsel cites *Patrick* v. *Howard*, 47 Mich. 40, and *Dayton* v. *Dakin's Estate*, 103 Mich. 65, in support of this contention. These were cases of claims of creditors, and are distinguishable from this case, which falls under the well-settled rule that in cases of accounting by administrators and executors it is proper for the circuit court to allow amendments and additions to the account presented for settlement in furtherance of justice, in support of which counsel for the executor cite *Brown* v. *Forsche*, 43 Mich. 501; *Loomis* v. *Armstrong*, 49 Mich. 527, 63 Mich. 366. We are of the opinion that the amendment was properly allowed.

A suitable tombstone was a proper charge. See *Pistorius' Appeal*, 53 Mich. 350. The other items were proper ones, provided they were for services rendered to the estate under circumstances showing them to have been necessary, and the charges reasonable. No charge was made for the services of the executor, and there was evidence that Leech performed the labor appertaining to the office. It was just that the executor should be paid for the labor performed, and the same may be said of counsel fees and expenses. We gather from the record that the jury passed upon these questions and that the court approved their verdict, and it is not usual for us to review disputed questions of fact, if there is evidence supporting the conclusion reached. It should, however, appear that the services were rendered, that they were necessary, and that the charges were reasonable. It seems, however, to be the general rule that services such as these are rendered for the executor, and that it is only through the medium of his account that the estate can be charged for them, and not then until he has paid them. Such is the practice in

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New York under their statute, as shown by cases cited in the appellant's brief. See *Shields* v. *Sullivan*, 3 Dem. 299; *In re Bailey's Estate*, 47 Hun, 477; *Seaman* v. *Whitehead*, 78 N. Y. 309. In *Austin* v. *Munro*, 47 N. Y. 360, executors made a contract for services in vindicating and asserting their claim to property in their representative capacity, and for the benefit of the estate they represented, and it was held not to bind the estate. It was there said:

"The principle is that an executor may disburse and use the funds of the estate for the purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator."

The same rule prevails in Alabama. *Pearson* v. *Darrington*, 32 Ala. 263; *Bates* v. *Vary*, 40 Ala. 441. See, also, 3 Williams, Ex'rs, 425, 494, 495; 2 Williams, Ex'rs, 193–195; Schouler, Ex'rs & Adm'rs, § 544.

The propriety of this rule is made apparent by the account filed in this case, which consists of numerous items alleged to have been disbursed for the estate, such as railroad fare, repairs, taxes, interest, hardware, hotel bills, cleaning sidewalk, painting, etc. All of these were for services or expenses alleged to have been rendered or incurred for the benefit of the estate, and, for aught that we can say, were proper charges if they were paid, but, if not paid, they should not be made a part of the account. The law requires executors and administrators to file accounts periodically, and when ordered by the court. These accounts are supposed to show what the officer has received from and disbursed for the estate, and it would be anomalous for items to be allowed to the executor before he had paid them, even if they were strictly charges against the estate, such as claims allowed by commissioners, or amounts of legacies allowed. In this case those who furnished hardware, paint, and labor for the executor had a charge against him for it, not against the estate, which, when paid by him, whether from his

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own or estate funds, he might have asked to have allowed if a reasonable and proper expenditure. Attorney fees are upon the same footing. As well might the various little items of labor for painting, cleaning walks, etc., be allowed to him before payment, upon the theory that he had incurred an obligation, as for counsel fees to be so allowed. The temptations afforded by fiduciary relations should not be increased by a relaxation of the rule requiring actual disbursements of estate funds before giving credit for such disbursements. In *Bates* v. *Vary*, 40 Ala. 441, the court say: "A trustee is not entitled to a credit on a settlement for such services, or the value of them, unless he shows payment." In *Re Heather's Estate*, 15 Abb. N. C. 197, it is said: "In no event could such allowance be made until the administrator had paid his counsel, and applied for reimbursement." Similar language will be found in the case of *Shields* v. *Sullivan*, 3 Dem. 300. In *Re Bailey*, 47 Hun, 477, it was said:

"For payment so made a claim may be made for reimbursement out of the funds of the estate; but the rule is well settled that in no event can an allowance be made by the surrogate for a claim presented by an executor until he has actually paid his counsel, and has applied for reimbursement. *Shields* v. *Sullivan*, 3 Dem. 296. In this case Brisbin, the executor, was credited in his decree with $200, value of services of George B. Lawrence, an attorney, and with $150 for services of C. A. Waldron, his attorney in another action; the undisputed evidence being that no money had been paid to them; not a dollar of the funds of the estate had been applied in making such payment. True, he had given his notes for the amount, but the surrogate finds as a fact that he was insolvent, so that the giving of the notes was a mere matter of form, and the conclusion is almost irresistible that the attorneys, having abandoned all hope of compensation, accepted the notes so as to reduce the amount of the executor's liability for moneys received to the devisees under the will. It seems to be clear that the claim of the executor did not come within the rule justifying the surrogate in giving the credit as provided in the decree."

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That the obligation is due from the executor to the attorney, and not from the estate, is held in many cases. *Tucker* v. *Grace*, 61 Ark. 410; *Pike* v. *Thomas*, 62 Ark. 223; *Long* v. *Rodman*, 58 Ind. 61. In the last-mentioned case the court said:

"In the 149th section of the act providing for the settlement of decedents' estates, etc., approved June 17, 1852, it is provided that the proper court may allow to an executor or administrator reasonable attorney's fees, where he employs an attorney in the management of such estate. 2 Rev. Stat. 1876, p. 546. Under a fair and reasonable construction of this provision, it seems to us that an executor or administrator may employ an attorney in the management of his decedent's estate; that, in the absence of any special agreement to the contrary, such executor or administrator will be personally liable to such attorney for his reasonable fees; that on the payment of such reasonable attorney's fees such executor or administrator shall be allowed therefor by the proper court; and that, in the absence of any special contract by the attorney that he will look to the decedent's estate for his pay, as his reasonable fees are made a proper charge against such estate, such attorney may, as he may elect, enforce the collection of his reasonable fees from such executor or administrator, in his personal capacity, or he may present his claim therefor to the proper court for allowance as a proper charge against such estate. The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held personally liable therefor, when he does not stipulate for exemption from such liability."

This clearly implies that the administrator can have such charges allowed as disbursements, *on payment*. This rule is not based on statute, but, as shown in the New York cases, exists notwithstanding the statute authorizes the allowance of counsel fees. In 2 Williams, Ex'rs, p. 195, it is said: "But no allowance can be made for such fees until they have been actually paid."

The case of *Hoke* v. *Hoke*, 12 W. Va. 427, is supposed to support the allowance in this case, but that may well be doubted. It does not appear that the item was not paid,

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and it is not improbable that the only allusion to the subject sprang from the caution of the court in its recognition of the very rule which has been discussed. According to the headnote of that case, it was held that the executor was justified by the circumstances in employing counsel, and that reasonable charges for services might be allowed by the probate court to the executor, *if he had paid them*, and, *if not*, they *might be allowed to counsel, and payment directed by the estate.* It will be noticed in this case that the lower court required that such allowance be based on an itemized statement of actual expenses and charges for services rendered. Id. 455.

It would seem clear, therefore, that whether the charges for counsel fees were reasonable and proper charges as against the estate or not, the court should not have allowed them to the executor, because he had not paid them. Upon payment of said fees it would seem to be a proper subject for another account. The executor should be given an opportunity of making himself whole if he is indebted for such items as are reasonable, and have not been paid, if he acts seasonably.

Another question arises over interest upon the amount collected upon the insurance policy. If, as contended, the executor attempted to embezzle this fund, he is chargeable with interest, subject to an offset by way of interest upon payments for the estate advanced by him or from such fund; otherwise interest should not be allowed upon such fund.

As it clearly appears that neither the counsel fees nor the item for the services of Leech had been paid, the court should not have allowed them. The order of the circuit court should be reversed, and a new trial ordered.

GRANT, J., concurred with HOOKER, J.

LONG, C. J. It is said by my Brother HOOKER that, as the counsel fees had not been paid, the court should not have allowed that item. I cannot agree with that

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contention. 2 How. Stat. § 5958, provides: "The executor or administrator shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides, together with all extra expenses," etc. The charge for an attorney or counsel must, of course, be for necessary services actually rendered, and the liability therefor incurred by the executor. There is no question raised but that the services of the attorney here were rendered to the estate, and were necessary in the settlement thereof, and that the charge is reasonable. The only ground upon which this item of the account is eliminated by my Brother HOOKER is that the executor had not in fact paid it. I am aware that in some jurisdictions this is held to be necessary under the provisions of the statute, but our statute cannot be given that construction. Such a one would, in many instances, work great hardship and loss to estates. Suppose the assets of the estate were not immediately available, and it was threatened with litigation; must the executor advance the money from his own funds? I think not. The statute should be so construed that the executor or administrator may safely procure the aid of legal advisers, and thus bind the estate for the payment of what may be found reasonable. In *Hoke* v. *Hoke*, 12 W. Va. 491, the claim was that the court erred in allowing fees to counsel of appellant as executor, and it was held that it was proper and prudent for the executor to employ counsel, and that it was to the interest of the estate that he should do so, and the allowance was affirmed. The case should not be reversed upon this ground.

The judgment should be affirmed.

MONTGOMERY and MOORE, JJ., concurred with LONG, C. J.

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## ENO *v.* ALLEN.

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EVIDENCE—HEARSAY.

In an action for malicious prosecution in procuring plaintiff's arrest upon a criminal charge, evidence of a statement made by the prosecuting attorney subsequent to the arrest, that he had told the defendant to withhold the warrant until the suspected person could be identified, is not substantive proof that the defendant was so instructed.

Error to Monroe; Kinne, J. Submitted April 14, 1897. Decided June 28, 1897.

Case by Adna Eno against Horace H. Allen for malicious prosecution. From a judgment for plaintiff, defendant brings error. Reversed.

*G. M. Landon*, for appellant.

*John E. Bird* and *John O. Zabel*, for appellee.

MONTGOMERY, J. This action is for malicious prosecution. Plaintiff showed that his arrest was under a warrant issued on a complaint made by defendant charging him (plaintiff) with the larceny of a quantity of clover seed, and further showed that he was discharged from this arrest. Defendant did not, upon this trial, contend that plaintiff was guilty of the offense of larceny, but showed the fact that the clover seed that the plaintiff was charged with having stolen was stolen from defendant, and gave evidence tending to show a combination of circumstances which pointed to the plaintiff as the perpetrator of the offense. The mistake was a mistake of identity.

The larceny occurred some weeks before the institution of the prosecution, and the public authorities, including the prosecuting attorney and sheriff, had been endeavor-

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ing to discover the offender. The prosecuting attorney, it would seem, had sent word to the defendant to come to Monroe to make complaint. Defendant went to Monroe, and had a short talk with the prosecuting attorney, who was at the time engaged in the trial of a case, and stated that he told him all that he could in the time that he had, and kept nothing back which he thought was pertinent; that he did not know the man, and did not wish him arrested if he was not the man wanted; that he told the prosecuting attorney what he had been told, and the suspicious circumstances; that the prosecuting attorney directed the defendant to go with the sheriff, and take out a warrant, stating that he would send a man to identify with the sheriff before making the arrest, and, if they did not identify plaintiff, he (plaintiff) was not to know that the sheriff had a warrant. This testimony was corroborated by the prosecuting attorney. Defendant testified on the cross-examination that he did not tell the prosecuting attorney all the facts, as he did not have time. The plaintiff also introduced testimony tending to show that the prosecuting attorney, some time after the arrest, stated to the witness that he had directed the defendant to make complaint; that he had no time to talk with defendant at the time, and told defendant that he might make complaint, but to investigate it further before serving the warrant. This testimony was disputed by the prosecuting attorney.

The question naturally presented by this testimony was whether the prosecuting attorney was responsible for the prosecution or whether the defendant instituted it. As to the controlling question in determining this fact, see *Smith* v. *Austin*, 49 Mich. 286. Whether the defendant's requests presented this theory we need not inquire, as the court, in one material portion of the instruction, fell into serious error. The instruction given was as follows:

"It is claimed on the part of the plaintiff that, when the prosecuting attorney directed Mr. Allen to make the com-

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plaint, he instructed him not to have the warrant served until he (Mr. Allen) had made further investigation. This is controverted and disputed by Mr. Allen and Mr. Lockwood, the prosecuting attorney. If, however, the contention of the plaintiff in this respect is correct, it imposed upon Mr. Allen the duty to further investigate the identity of the plaintiff, and, if he failed to do so, then the authority of the prosecuting attorney would be no protection to him; but if Mr. Allen, acting through the sheriff and the other parties, did make further investigation before the service of the warrant, and if such investigation would have satisfied an ordinarily prudent man of the identity and guilt of the plaintiff, then, even though a mistake was made, the defendant would be fully protected and justified."

There was no proof whatever that the prosecuting attorney told defendant not to serve the warrant until the plaintiff was identified, except the alleged admission made long after the complaint was made. This was not substantive proof of the fact.

Judgment will be reversed, and a new trial ordered.

LONG, C. J., and HOOKER, J., concurred with MONTGOMERY, J.

GRANT, J. I concur in the reversal of this case, but I think that the court should have directed a verdict for the defendant. The record contains no evidence of bad faith or malice on the part of the defendant, nor does it show that he withheld any material fact from the knowledge of the prosecuting attorney. The only statement I find in the record from which the inference could be drawn that he did withhold material facts is found in defendant's cross-examination, which is given in narrative form. He testified: "Our conversation lasted probably five minutes, and do not think I told him all I knew. I did not tell him anything I did not know." The officer and the prosecuting attorney had been active in their efforts to discover the thief who stole the clover seed. The defendant went to see the prosecuting attorney at the lat-



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ter's request. The prosecuting attorney then directed defendant to make a complaint against plaintiff, and directed the officer not to serve it until he was satisfied from investigation of the identity of the plaintiff. After that defendant had nothing to do with the proceeding. If there is fault chargeable to any one, it is to the prosecuting attorney and sheriff, rather than to the defendant.

MOORE, J., concurred with GRANT, J.

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## BAILEY *v.* HOLDEN.

1. WITNESSES—COMPETENCY—MATTERS WITHIN KNOWLEDGE OF DECEDENT.

   Under 3 How. Stat. § 7545, one who files a bill to quiet title against the assigns of a deceased person, through whom he also claims by a prior conveyance, is incompetent to testify to matters which, if true, were equally within the knowledge of the deceased.

2. EQUITY—EVIDENCE—PRESUMPTION ON APPEAL.

   No presumption in favor of the correctness of the determination of the circuit judge on disputed questions of fact in a chancery case can attach upon appeal, when it appears that such decision was based in part upon inadmissible testimony.

Appeal from Barry; Smith, J. Submitted April 14, 1897. Decided June 28, 1897.

Bill by Frank Bailey against John Holden and others to remove a cloud from title. From a decree for complainant, defendants appeal. Reversed.

*Barrell & Potter*, *W. S. Powers*, and *Philip T. Colgrove*, for complainant.

*Alonzo D. Cadwallader* (*Alfred J. Mills*, of counsel), for defendants.

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MONTGOMERY, J. The original bill was filed by the complainant to remove a cloud from the title to lands claimed to be owned by him. The bill alleges that the complainant acquired his title through a conveyance made on the 21st of November, 1893, to him by his wife, Mary; that he went into actual possession of the land, and has remained in possession ever since; and that on the 10th of November, 1894, his wife, Mary, died intestate, and without issue. The bill avers that the defendant John Holden, on the day of the death of complainant's wife, caused a conveyance of the premises in question from Mary Bailey to defendants Carrie F. Holden, Frank H. Holden, Pearl G. Holden, and Bernice N. Holden, purporting to have been executed on the 29th of October, 1894, to be placed of record. The defendant John Holden is a brother of Mary Bailey, deceased, and the other defendants are his minor children. Defendants, by their answer and cross-bill, aver that the conveyance under which complainant claims was procured by means of influence which complainant had over his wife, and was executed with the express understanding that it was to operate and be considered as a will of Mary Bailey, and to take effect only at her death, and that she reserved the full power of revocation.

The case turned below, and must turn here, upon the determination of the question as to whether the conveyance was made as an absolute conveyance, or with the purpose that it be delivered and take effect after the death of Mary Bailey; and this is mainly a question of fact. Three persons besides the deceased were present when the deed to complainant was signed. They were complainant himself, an attorney named Lowden, who had driven out to the residence of deceased and complainant for the purpose of taking the acknowledgment of the deed, and who had in advance prepared the deed for execution, and a domestic, Miss Hazel.

A preliminary question is made as to whether complainant is a competent witness to testify to facts equally

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within the knowledge of his deceased wife. The statute (section 7545, 3 How. Stat.) provides that—

"When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person."

Defendants are the assigns of Mary Bailey. They claim under a deed executed by her in due form, to defeat which it is necessary to show that she had parted with title prior to the date of the deed to defendants, and the testimony which complainant offered was for the purpose of establishing this fact. In *Ripley* v. *Seligman*, 88 Mich. 177, at page 189, Mr. Justice CHAMPLIN said:

"The word 'assigns' is used here in its legal sense, and signifies a person to whom any property or right is transferred by a deceased person in his lifetime. The statute is broad enough to cover successive transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his lifetime; and any one who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute to shield his interest from the testimony of the opposite party to matters which, if true, were equally within the knowledge of the deceased person through whom he claims."

In *Schuffert* v. *Grote*, 88 Mich. 650 (26 Am. St. Rep. 316), a son filed a bill to set aside a deed executed by his father, since deceased, to the defendant, and confirm the title to the land in the complainant under a prior deed executed to complainant by the father. It was held that the testimony of the complainant as to the execution of the first deed, and as to what took place between his father and himself, was excluded by the statute. The case is on all fours with the present. In *Lloyd* v. *Hollenback*, 98 Mich. 203, a daughter of her deceased father filed a bill alleging an agreement to give complainant cer-

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tain property in consideration of a life support, and to set aside a deed executed by her father in his lifetime to defendant. The statute was held to exclude her testimony. See, also, *Connolly* v. *Keating*, 102 Mich. 1.

Complainant cites, to sustain the admissibility of the testimony, the case of *Latourette* v. *McKeon*, 104 Mich. 156. In that case the action was brought against the maker of a note by one claiming to be the assignee of the deceased payee. No representative of such deceased payee was prosecutor or defendant in the suit. But in the case of *Hillman* v. *Schwenk*, 68 Mich. 297, cited in *Latourette* v. *McKeon*, it was said:

"If the executor had indemnified the defendants, or had taken upon himself the defense of the suit, the statute excluding the plaintiff from testifying to matters which were equally within the knowledge of the deceased would have applied."

So, in the case of *Brown* v. *Bell*, 58 Mich. 58, and *Schofield* v. *Walker*, Id. 96, it was held that the testimony of the proponent of a will is not excluded, for the reason that there is no "opposite party" representing the estate of the deceased. If the case of *Lautenshlager* v. *Lautenshlager*, 80 Mich. 285, is to be deemed a misapplication of the doctrine of *Brown* v. *Bell*, the distinction has since been made in the later cases above referred to, and the rule firmly established. We think the testimony of the complainant was not competent.

The testimony of the witness Lowden we find far from satisfactory. It was given at a time when he was in jail awaiting a sentence for the crime of forgery. He testified that complainant came to him with a request, either verbal or in writing, that he prepare a deed, and take it out to the residence, seven or eight miles from town, for execution; that such a deed was drafted by his clerk; that he went to Mrs. Bailey's farm, remained over night, and in the morning the deed was executed, with suspicious formality; that one dollar, a nominal consideration, was in fact paid; that the deed was delivered to complainant;

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and that after delivery Mrs. Bailey for the first time stated that she wished to have the deed withheld from record, as her brother John would be angry if he knew of the conveyance. The force of the testimony of this witness is very much weakened by the fact that subsequently he admits that he received pay from John Holden for going out to see Mrs. Bailey in regard to canceling the deed, and by the fact that he took the deed along with him at the time,—conduct hardly consistent with his present testimony that the deed was delivered beyond recall, and that he was simply withholding it from record until the decease of Mrs. Bailey. The fact that it was to be withheld from record is significant, and the claim that the reason for withholding it was to avoid difficulty with her brother John Holden is inconsistent with the alleged course of the parties thereafter. Mrs. Bailey, it appears, made no secret of the fact that this deed had been made by her. Complainant himself produces a number of witnesses to testify to statements made by her to them to the effect that she had made such a deed. These statements, it is claimed, corroborate the contention of complainant, but we think they are of little weight in that direction. There can be no doubt that Mrs. Bailey, at the time of the execution of this deed, intended that at her death Mr. Bailey should receive her property. But the question of supreme importance is whether she intended, at the time, that the deed was delivered beyond recall.

The other witness to the deed was Miss Hazel. She testified that the deed was delivered to Mr. Lowden by Mary Bailey, conditionally; that she told him to take the deed, keep it until she called for it, and, if she called for it before her death, he was to deliver it up; if not, it was to be put on record after she died. It is true that there are some inconsistencies in the testimony of this witness, and we are compelled to rest our conclusions upon evidence which is not altogether satisfactory. But, having in view the relationship of the parties, and the fact that Mary Bailey was the wife of the complainant, and to

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some extent under his control, we think the assertion of such a claim as that which he has put forth should be closely scrutinized, and that, upon the whole, the evidence preponderates in favor of the defendants. We should hesitate, in a case so close upon its facts, to overturn the decision of the circuit judge, were it not for the fact that the court rested his conclusion in part upon the testimony of the complainant himself, which, we have seen, is inadmissible. This devolves upon us the duty of considering the testimony without the aid of the presumption arising from the circuit judge's determination, which course has been pursued, with the result above stated. The case is very similar in its facts to *Schuffert* v. *Grote*, 88 Mich. 650 (26 Am. St. Rep. 316).

The decree of the court below will be reversed, and the relief prayed in the cross-bill granted, with costs of both courts to defendants.

The other Justices concurred.

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## LANDIS v. SMITH.

DEEDS—SETTING ASIDE—FRAUD—EVIDENCE.

Evidence that the grantor in a deed of property worth about $1,500, for a specified consideration of $1,800, was old and of weak memory, and that the grantee actually paid only $5 down, and failed to secure the balance by mortgage on the property as had been contemplated, and that the grantor was induced to convey by fear as to the outcome of a suit brought against the grantee, who was his tenant, by a third person, to oust him from possession,—justifies the setting aside of the deed.

Appeal from Kent; Grove, J. Submitted April 16, 1897. Decided June 28, 1897.

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Bill by John Landis against Amanda C. Smith to set aside a deed alleged to have been procured by fraud and undue influence. From a decree dismissing the bill, complainant appeals. Reversed.

*Dwight Goss*, for complainant.

*Charles A. Watt*, for defendant.

GRANT, J. Complainant filed a bill to set aside a deed made by himself to defendant, claiming that at the time of executing the deed he was in poor health, and did not realize the force and effect of the instrument he signed, or the intent and purpose for which the same was executed, and that the same was not his free act and deed. The bill further avers that defendant represented that, if complainant did not give the deed, one John R. Watts, who was occupying the land and cultivating it, would cheat complainant out of it. The answer denies the allegations in the bill, admits that the consideration named in the deed was $1,800, but denies that there was no consideration given for the deed, denies that it was obtained by fraud and undue influence, and that it was an unconscionable bargain, but, on the contrary, avers that there was a good and valuable consideration for the same. The circuit judge dismissed the bill on the ground that there was no evidence of undue influence or persuasion, that the complainant voluntarily made the deed, although the circuit judge stated that the complainant impressed him as a man whose memory of past events was very weak indeed.

The case is peculiar, in that it rests so largely upon the testimony of complainant, who has shown himself to be a man of weak memory; but the following facts are gleaned from other testimony: The land in question is worth $1,500. Complainant regarded it as worth $1,800. There had been talk between complainant and defendant of complainant's deeding the land to her, some time before the deed was made. Complainant called upon one

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Thomas, a conveyancer, and wanted a deed of the land and a mortgage back prepared. This Thomas promised to do when the weather cleared up, and it was warm enough, agreeing to come to complainant's residence to do so. It does appear in the testimony that there was a disagreement between Watts, who occupied the house on the premises, and the defendant and her husband, who also occupied a house on the same 40; and we have no doubt that this was one of the incentives for the complainant's making the deed. Taking it as established that the complainant was mentally weak, the testimony of defendant is significant. She testified as follows:

"*Q.* Do you remember when this deed was given to you by Mr. Landis,—the 40 acres of land there where you live? Do you remember when you got the deed?

"*A.* Yes, sir.

"*Q.* Whereabouts— Who drew it?

"*A.* Mr. Palmer.

"*Q.* How did you come to go there to have the deed drawn?

"*A.* Why, he wanted to go.

"*Q.* Did you ever talk with him personally about his giving you a deed of that place?

"*A.* No, sir; I did not.

"*Q.* When was the first time he ever spoke to you about making out a deed to you for that 40 acres?

"*A.* Well, I think it was—oh, maybe four or five weeks before the deed was made.

"*Q.* What was said at that time by him to you?

"*A.* Well, he said he thought he better deed it to me.

"*Q.* Were you having some trouble with Mr. Watts at that time?

"*A.* Mr. Watts served papers on me to move away from there.

"*Q.* You live on the same 40 acres that he lives on there?

"*A.* Yes, sir.

"*Q.* Two houses on the 40, are there?

"*A.* Yes, sir.

"*Q.* Mr. Watts was trying to put you off the place?

"*A.* Yes.

"*Q.* Did he talk more than once to you about giving you the deed?

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"*A.* Why, yes. He came up there frequently, and said we had better go and have it made out.

"*Q.* What did you tell him?

"*A.* Why, I told him I would go at any time, and he said at any time that I was ready we would go. * * *

"*Q.* What did he say to you?

"*A.* He said we ought to go there and have it done, and have the deed made.

"*Q.* What did you tell him?

"*A.* I told him we would go this afternoon if he wanted to go, and he said he was ready to go at any time that I was. * * *

"*Q.* Was there anything said— Who did the talking at Mr. Palmer's when the deed was drawn?

"*A.* He did the talking.

"*Q.* Was anything said there about your giving a mortgage back?

"*A.* No, sir.

"*Q.* Did he ever ask you for a mortgage?

"*A.* He talked about it one day after he had been up to Mr. Thomas'.

"*Q.* What did he say?

"*A.* He said that Mr. Thomas advised him to have a mortgage back.

"*Q.* How did he come to give you a deed, or make the deed to you? What did he say? Tell the court the words that he used, as near as you can. What reason did he give for wanting to give you the deed?

"*A.* Well, when Mr. Watts served papers on me I saw him down in the road. I went down the road, and I met him. I stopped, and talked with him, but I didn't say anything about this case. I didn't know as he knew anything about it. And he says, 'Mr. John Watts is trying to make you trouble, isn't he?' And I said, 'It looks that way.' He said, 'I don't see how he can.' He says, 'He has no right to,' and he said that he didn't see why George Thomas should make out the papers for him, or what he did it for; and he said he would have to look into it a little; and I told him he need not worry about it; and that was all there was said then.

"*Q.* State any other conversation that you had with him after that, or that he had with you, in regard to making the deed.

"*A.* Well, just when he told me that he thought he had better deed it to me—

"*Q.* What did you tell him?

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"*A.* I didn't say anything at that time. He said, 'I guess I better deed the place to you.' * * *

"*Q.* Was there anything said about selling the place, or just giving you a deed of it?

"*A.* Yes, he talked of selling it to us.

"*Q.* What did you tell him then?

"*A.* He asked me if I wanted to buy it, and I told him I would like to buy it well enough if I could.

"*Q.* What did you tell him about the pay?

"*A.* But I told him that of course I didn't know. We couldn't pay very much down. Well, he said that whatever I could pay it would be all right.

"*Q.* Since the deed was made, has he ever asked you for any money on this place?

"*A.* No, sir.

"*Q.* Did he talk with you when you went over to Mr. Palmer's? Did you talk the matter over in regard to the conditions on which he would let you have the place?

"*A.* There was nothing said, only he said, 'I guess I don't want any mortgage.' * * *

"*Q.* And Mr. Palmer testified that you paid him some money there at that time?

"*A.* I did.

"*Q.* How much did you pay him?

"*A.* I paid him five dollars.

"*Q.* How did you come to pay him five dollars?

"*A.* That was all I had, and he said whatever I could pay would be all right. That was all I had at that time. * * *

"*Q.* You say you paid him five dollars at that time?

"*A.* I did.

"*Q.* How did it come that the consideration named in the deed was $1,800?

"*Mr. Wigent:* The deed is the best evidence.

"*A.* Well, that was what he wanted for the place.

"*Q.* And $1,800 was put in at his suggestion?

"*A.* Yes, sir.

"*Q.* Well, as a matter of fact, is this five dollars all the money you have ever paid on that $1,800 for that place?

"*A.* That is all the money I ever paid; yes. * * *

"*Q.* What did you say to him when he asked you to deed it back before the suit was commenced?

"*A.* Well, I asked him the reason, and he said—Well, he said he thought that and the 80 would make

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a good farm. Well, I says, 'You had it long enough; you ought to have thought about that before.' * * *

"*Q.* You testified that he spoke about a mortgage after he came back from Thomas', and before he made the deed?

"*A.* When he came back from Thomas'—that was before the deed was made out—he said that Mr. Thomas advised him to have a mortgage, and he asked me if that was all right.

"*Q.* And what did you tell him?

"*A.* I told him yes.

"*Q.* Did he say anything about a mortgage when you went to Palmer's?

"*A.* Yes. When we were going he said, 'I guess I don't want any mortgage.' * * *

"*Q.* How did he come to name $1,800 as the consideration for this deed? Do you remember about that?

"*A.* Well, he thought that it was worth that.

"*Q.* Is the 40 actually worth $1,800 now?

"*A.* Well, I don't know; that is what he thought.

"*Q.* What is your judgment about it?

"*A.* Of course, I don't know. That is what he thought he wanted for it."

It further appeared from the testimony of this witness that after the making of the deed she had given a mortgage upon the property of $300.

It is very clear from the testimony of this witness that neither party, in the negotiations for this property, had expected that the land was to be deeded to defendant as a gift; and yet, as the transaction was closed, that is substantially what had been accomplished. The inference that the complainant did not fully understand the nature of the transaction, and that defendant took advantage of his condition, is irresistible. There is no doubt that he was moved by his fear of the results in the proceedings which Watts was about to institute, and, whatever else may be said, it is perfectly certain that no such program as the defendant herself testifies was in contemplation of the parties was carried out. We think, under the former rulings of this court, the decree should have been for complainant. See *Stuy-*

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*vesant* v. *Wilcox*, 92 Mich. 228; *Smith* v. *Cuddy*, 96 Mich. 562; *Churchill* v. *Scott*, 65 Mich. 485; *McDaniel* v. *McCoy*, 68 Mich. 332. See, also, *Allore* v. *Jewell*, 94 U. S. 506. We think the circuit judge did not give due weight to the evidence, which establishes the fact, to our satisfaction, that the previous negotiations of the parties all involved a proposition to convey the land and take a mortgage back.

The decree will be reversed, and a decree entered in this court setting aside the deed.

The other Justices concurred

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## BUBLITZ v. TROMBLEY.

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REPLEVIN — DISTRAINED BEASTS — SUFFICIENCY OF BOND — CONSTRUCTION OF STATUTE.

2 How. Stat. § 8374, which provides that, in replevin for beasts distrained, the failure of plaintiff to give the proper bond within the time limited for that purpose shall be deemed a discontinuance by him of his suit, is to be construed with the general statute (section 7771) relative to the amendment of defective bonds, and, so construed, affords no authority for the circuit judge to dismiss a suit summarily, upon his own motion, because the bond filed has but one surety.

Error to Bay; Maxwell, J. Submitted April 28, 1897. Decided June 28, 1897.

Replevin by Frank Bublitz against Andrew Trombley for distrained cattle. From an order discontinuing the suit because of a defect in the bond, plaintiff brings error. Reversed.

*John E. Kinnane*, for appellant.

*Lyon & Pierce*, for appellee.

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MONTGOMERY, J. This is an action of replevin for beasts distrained. Affidavit for replevin was made on June 14, 1895, and the writ issued the same day. The cattle named in the writ were appraised, the bond was made, and delivered to the sheriff, with but one surety. The bond was accepted and approved by the sheriff, and filed with his return on July 2, 1895. Notice of retainer was regularly served by defendant, and plaintiff's declaration was filed in due time. Defendant filed a plea of the general issue, and gave notice of special matter of defense. No exception was taken to the replevin bond, or to any of the proceedings in the cause. The case was noticed for trial by both parties, and was regularly brought to trial March 17, 1896. After entering upon the trial, the court discharged the jury, and rendered judgment of discontinuance against the plaintiff, on the ground that there was but one surety on the replevin bond, and that that fact worked a discontinuance of the case under the statute.

The court based its ruling on section 8374, 2 How. Stat., which reads as follows:

"The writ shall be served, and the property shall be appraised, and, before delivery thereof to the plaintiff, a bond shall be given in like manner and with the same effect as in other cases of replevin; but such property shall not be removed by the officer until such bond shall be given; and if such bond be not given within the time limited for that purpose, the property shall be relinquished by the sheriff, and such failure shall be deemed a discontinuance of the suit by the plaintiff."

We think this course was unwarranted. In *Bloomingdale* v. *Chittenden*, 75 Mich. 307, an attempt was made to file an amended bond, which the statute requires shall be filed forthwith. On motion to dismiss for a defective bond, the court said:

"The bond is required for the protection of the defendant; and although the statute is peremptory that, unless the new bond is filed *forthwith*, the writ shall be dismissed on motion, and the property returned to defendant, it may be waived by the defendant, and must be regarded

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in this case as having been waived by going to trial before the justice upon the merits, and again in the circuit, without objection on this ground."

The learned circuit judge was evidently of the view that under section 8374 no waiver of a sufficient bond could occur. But we think it clear that under sections 7770 and 7771 an amendment to the bond might have been permitted. While it is true that the language of the statute is that the failure to give such a bond shall be deemed a discontinuance of the suit by the plaintiff, this is to be construed in connection with section 7771, and, so construed, it is enough to say that it shall be deemed a discontinuance of the suit at the election of defendant, and provided the plaintiff is not prepared, upon being given an opportunity, to give a new bond, and provided further that the defendant has not waived the giving of a bond.

We do not intimate that the defendant may not yet move for a new bond, but the record does not indicate that the defendant either moved for a new bond or for the order discontinuing the case. The action appears to have been taken by the circuit judge upon his own motion, and no opportunity appears to have been afforded to move for leave to file an amended bond.

We think the order of discontinuance should be set aside, and the cause remanded for further proceedings. The plaintiff will recover costs of this court.

The other Justices concurred.

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## MATTHEWS *v.* FORSLUND.

JUSTICES OF THE PEACE—ATTACHMENT—SUBSTITUTED SERVICE.

Substituted service of a justice's writ of attachment, made on the sixth day before the return day of the writ, is valid, where the officer's return shows that he retained the writ in his hands, and made proper effort to obtain personal service, during the full time within which such service might lawfully be made; and *it seems*, further, that substituted service upon a prior date would be good under such circumstances. *Bargh* v. *Ermeling*, 110 Mich. 164, distinguished.

Error to Gogebic; Haire, J. Submitted April 28, 1897. Decided June 28, 1897.

Attachment proceedings by John B. Matthews and others against Mathilda Forslund, wherein the Gogebic Hardwood Manufacturing Company was summoned as garnishee. Plaintiffs had judgment in justice's court, and defendant removed the case to the circuit on *certiorari*, where the justice's judgment was sustained. Defendant brings error. Affirmed.

*Buck & Waples*, for appellant.

*John D. Barry* (*Julius J. Patek*, of counsel), for appellees.

MONTGOMERY, J. This case was commenced in justice's court by attachment. The case was removed to the circuit court upon *certiorari*, the sole ground of error alleged being that the service upon the garnishee defendant of the writ of attachment issued out of justice's court was made upon a day when valid service could have been made upon the principal defendant. It appears that the writ was served upon the last day that service could have been made upon the principal defendant. The statute (section 6841, 3 How. Stat.) provides that, if the defend-

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ant cannot be found in the county, the officer shall leave a copy of the attachment and inventory at the last place of residence of the defendant. The only provision of the statute as to the time of service is that contained in section 6840, which fixes the time of service as at least six days before the return of the writ. It was accordingly held in *Tunningly* v. *Butcher*, 106 Mich. 35, that substituted service, made less than six days before the return day of the writ, was insufficient. It would necessarily follow from this holding that a substituted service made upon the last day permitted by the statute is good. The case of *Bargh* v. *Ermeling*, 110 Mich. 164, is clearly distinguishable, as in that case it did not appear by the return that any effort was made to make service upon the principal defendant. Speaking for myself, I can see no reason why a substituted service made at any time after the writ comes to the hands of the officer should not be held good, provided the officer retains the writ in his hands, and makes return of proper search for the defendant during the life of the writ.

Other questions are discussed in the brief of counsel, but we have repeatedly held that, when a party resorts to *certiorari*, he must make his allegations of error specific, and is confined to the precise points raised. *Farrah* v. *Bursley*, 100 Mich. 552.

The judgment will be affirmed.

The other Justices concurred.



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## LOCKWOOD *v.* NOBLE.

1. RECORDING LAWS—LIS PENDENS—NOTICE.
   A *lis pendens*, under 2 How. Stat. § 6619, is effectual from the date of filing as notice of the claims made in the bill, irrespective of whether service upon all of the defendants therein is at the time complete.

2. SAME—NEGOTIABLE PAPER—MORTGAGE SECURITY.
   A purchaser of a note secured by a mortgage on land to which the mortgagor had no title at the time, which fact would have been disclosed by an examination of the records, is entitled to no benefit under the mortgage.

3. BILLS AND NOTES—BONA FIDE HOLDER.
   The dishonor of one of several notes secured by a mortgage puts a subsequent purchaser of the other notes upon inquiry, and he takes them subject to all the equities.

4. BANKRUPTCY—TITLE OF ASSIGNEE.
   An assignee in bankruptcy can convey only such title as his assignor had at the time he was adjudged a bankrupt.

Appeal from Huron; Beach, J. Submitted June 8, 1897. Decided June 28, 1897.

Bill by Frederick St. John Lockwood against Orange Noble and Charles E. Thompson to remove a cloud from title. From a decree for complainant, defendant Noble appeals. Affirmed.

The object of this suit is to remove a cloud from title, caused by a decree and sale of the lands described therein on the foreclosure of a mortgage. Complainant and defendant Noble derived title from Thomas S. Donohue, who was the owner in fee of the lands, May 29, 1867. On that day Donohue made a contract with Ayres, Learned & Wiswall for the sale of these lands for $3,000; a warranty deed to be given within 30 days. $2,400 was paid at the time the contract was executed, and the bal-

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ance was to be paid by a 90-day draft. July 1, 1867, Donohue executed a warranty deed of this and other lands to W. F. Clark, Jr., and Henry A. Howe; taking back a mortgage to secure the purchase price, for the sum of $27,000. Howe and Clark, Jr., had full knowledge of the contract to Ayres, Learned & Wiswall. The deed and mortgage were recorded August 9, 1867. On December 16th of that year, Howe and Clark, Jr., conveyed an undivided one-third interest in said lands to W. F. Clark, Sr. February 8, 1868, Ayres, Learned & Wiswall filed a bill of complaint in the circuit court in chancery, alleging the above facts, and praying for a decree annulling and setting aside the deed to Howe and Clark, Jr., and from them to Clark, Sr. Donohue, Howe, and both the Clarks were made parties defendant. Upon filing the bill, a notice of *lis pendens* was duly filed and recorded in the office of the register of deeds. Personal service was had upon Donohue, Howe, and Clark, Jr. Clark, Sr., was a nonresident, and as to him an order of publication was obtained. Proofs were taken, and decree entered declaring the deed to Howe and Clark, Jr., and the one by them to Clark, Sr., to be fraudulent and void, and of no effect against the complainants, and declaring the title absolutely in them. A reference was made to determine the amount due the defendants or Donohue. It appeared that Donohue had no title to 240 acres of the land described in the contract, which was worth $3 per acre. At this time Clark, Sr., appeared, and Howe, Clark, Jr., and Clark, Sr., acknowledged and delivered to complainants a written acknowledgment of full satisfaction, stipulating that the decree should stand against them. Complainant, Lockwood, has succeeded by proper conveyances to all the title and interest of Ayres, Learned & Wiswall. It is conceded that complainant and his grantors have paid all the taxes from the year 1867 to the present time, and have exercised all the acts of ownership and possession which have been exercised by any one.

On August 27, 1868, Donohue assigned the mortgage to

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one C. A. Davidson, which assignment was recorded on the same day. One Mason in some way acquired an interest in the mortgage with Davidson. September 22, 1869, Davidson and Mason filed their bill to foreclose, but did not make Ayres, Learned & Wiswall parties thereto. Decree was duly entered, and September 22, 1871, the lands were sold to defendant Noble at from $10 to $15 for each 40 acres. November 1, 1869, Howe, Clark, Jr., and Clark, Sr., were adjudged bankrupts by the district court of the United States at Detroit. No notice of these bankruptcy proceedings was ever served upon Ayres, Learned & Wiswall, or their representatives or assigns. August 15, 1871, under an order of the United States court, these lands, with others, amounting in all to 7,500 acres, were sold at private sale by the assignee in bankruptcy to defendant Noble for $50.

Defendant Noble was a party to the foreclosure proceedings by Davidson and Mason. In his answer he set up the sale of the land by Donohue to Ayres, Learned & Wiswall, the bill filed by them to enforce their claim, and also that Ayres, Learned & Wiswall had a good title. Defendant Thompson has no interest, except as the assignee of certain creditors of defendant Noble, and has only such rights as Noble shall be found to have. Noble claims title by virtue of his deed from the assignee in bankruptcy, and the commissioner's deed upon the foreclosure sale. The court held that Noble was not a purchaser in good faith; that the notice of *lis pendens* was valid as to Davidson and Mason, the assignees of the mortgage; and that complainant had a perfect title to the land.

*William T. Bope*, for complainant.

*Horace G. Snover* (*Elbridge F. Bacon*, of counsel), for defendant Noble.

GRANT, J. (*after stating the facts*). 1. *The Equities.* The equities are all with the complainant. The defend-

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ant has none. The proceedings in the suit by Ayres, Learned & Wiswall to set aside the conveyances to Howe *et al.* were regular as to all the defendants except Clark, Sr.; and, if there was any irregularity as to him, it was cured by his subsequent appearance and stipulation. Noble purchased with full knowledge of all the facts. He knew, and alleged in his answer to the foreclosure bill, that the title of Ayres, Learned & Wiswall was valid, and that the attempted conveyance by Donohue, and the mortgage back to him, were a fraud. He paid substantially nothing, either for the title conveyed by the assignee in bankruptcy or upon the foreclosure sale. He paid only $53 in all for lands which are worth many times that amount. From the time of his alleged purchase to the commencement of this suit,—a period of many years,—he did not attempt to exercise any act of ownership or possession over these lands, while complainant and his grantors were exercising open and notorious acts of ownership. If, therefore, Noble has any standing in a court of either law or equity, it is because courts are powerless to prevent the accomplishment of a gross wrong. This brings us to a discussion and determination of the defenses relied upon.

2. It is urged that the *lis pendens* did not take effect from the date of its record, but from the date of the completion of the service upon all the defendants; that service was not complete as to Clark, Sr., and therefore the record of the notice was of no validity as to subsequent purchasers and mortgagees. The question is not open to discussion in this State. The statute says, "To render the *filing* of a bill constructive notice," etc., "it shall be the duty of the complainant to file for record," etc. 2 How. Stat. § 6619. The filing of this notice was notice to the whole world of the claim made in the bill, and took effect from the date of filing. *Alterauge* v. *Christiansen*, 48 Mich. 60; *Heim* v. *Ellis*, 49 Mich. 241. It was therefore the duty of Davidson and Mason to examine the record. Had they done so, the notice of *lis pendens* would

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have informed them that the mortgagors' title was in dispute, and that, if the allegations in the bill were true, they had no title to mortgage.

3. It is next urged that Davidson and Mason were *bona fide* purchasers of these notes, and are to be protected because the notes are negotiable. There are two answers to this contention which demonstrate its fallacy: (1) The law does not permit a party to execute a negotiable promissory note and a mortgage collateral thereto upon land to which he has no title, and make the security good in the hands of a purchaser of the negotiable paper before due, when the mortgagor had no title at the time in the land, and an examination of the record would have disclosed that fact; and (2), when Davidson and Mason purchased their notes, others were past due, there being six notes all told. Some had been paid, but one was dishonored and unpaid. Davidson and Mason therefore were not good-faith holders, but took subject to all the equities in the case. *Abele* v. *McGuigan*, 78 Mich. 415.

4. The assignee in bankruptcy took only the title which his assignors had at the time they were adjudged bankrupt, and could convey only such title as his assignors had. This is a doctrine so sound and reasonable that it hardly needs the citation of authorities. We cite a few: *Goss* v. *Coffin*, 66 Me. 432 (22 Am. Rep. 585); *Hardin* v. *Osborne*, 94 Ill. 571; *Ex parte Dalby*, 1 Low. 431; *Ex parte Rockford, etc., R. Co.*, Id. 345. It follows that the assignee, having nothing to convey, conveyed nothing.

5. It is insisted that $600 was unpaid upon the contract given by Donohue to Ayres, Learned & Wiswall, and that the defendant is entitled to this amount and interest. It is established that Donohue had no title to 240 acres, and that it was worth $3 per acre. Howe, Clark, Jr., and Clark, Sr., recognized the injustice of compelling Ayres, Learned & Wiswall to pay the balance of the purchase price for this reason, and therefore, by stipulation,

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consented to a decree to that effect. There is no equity in requiring complainant to pay this amount.

The decree of the court below was eminently just, and is affirmed, with costs.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## LEVY v. O'LEARY.

TRIAL—STIPULATION TO DISCONTINUE—PLEADING—EVIDENCE—INSTRUCTIONS.

A stipulation for the discontinuance of an action upon a promissory note against an indorser recited that the suit had been compromised and settled in full. Plaintiff thereafter instituted a new action upon the note, setting up in a special count that he had stipulated to discontinue the former case upon defendant's promise to give him a new note, and that the promise had never been fulfilled. Defendant, upon the trial, claimed that the note sued upon was turned over by him in payment of plaintiff's claim, and that it was never protested, so as to hold him as an indorser; that the agreement to discontinue the former suit was unconditional, except as shown by the stipulation itself. Plaintiff's testimony tended to show that the note was taken merely as collateral security, and that the conditions of the discontinuance of the former suit were as set up in his declaration. The jury were instructed that plaintiff could not recover if the note was taken in payment, or if the controversy had been settled by stipulation; but that if a fraud was practiced upon the plaintiff in the settlement, and the note was taken as collateral security merely, he should recover. *Held*, that the case was fairly submitted under the pleadings and the evidence.

Error to Wayne; Frazer, J. Submitted June 8, 1897. Decided June 28, 1897.

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*Assumpsit* by Julius J. Levy against Michael O'Leary upon a promissory note. From a judgment for plaintiff, defendant brings error. Affirmed.

The stipulation referred to in the opinion was in the following language:

"This case having been this day compromised and settled in full, it is hereby stipulated and agreed between the parties that the same may be and hereby is discontinued, without further costs or expenses to either party; each party paying his own costs and expenses to date, if any."

*Charles C. Stewart* (*William L. January*, of counsel), for appellant.

*Franklin L. Lord*, for appellee.

LONG, C. J. This cause was commenced in justice's court. The declaration was upon the common counts in *assumpsit*, with a copy of a note attached, dated April 15, 1893, for $90, due in six months, with interest at 6 per cent., signed by Oliver M. Dicks, and indorsed by Michael O'Leary. There was also a special count, setting up the fact that a previous suit had been commenced on the note in justice's court, that judgment had been rendered in favor of the plaintiff, from which an appeal had been taken by the defendant to the circuit court, and that there an agreement and stipulation had been entered into to discontinue said suit, on condition that the defendant give to the plaintiff a new note of $90, with good indorsement, payable in four months; that such stipulation was signed and discontinuance entered; but that defendant had wholly failed to give such new note, though often requested. Defendant pleaded the general issue, with notice of former suit and settlement thereof. On the trial before a jury, plaintiff had verdict and judgment.

On the trial, plaintiff introduced testimony tending to show that he received the note from the defendant; that at that time defendant owed him $45 on a note; that in taking the $90 note, signed by Dicks, he returned the

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defendant his note, and gave him $45 worth of goods; that he told defendant he was not willing to take the note as payment, but would take it until it was due as security; that he did not know Dicks, and that he would hold defendant for the payment; that defendant indorsed the note; that it was never protested for nonpayment; that, the note not being paid, he brought suit upon it; that, after this suit was appealed to the circuit, he entered into an agreement to discontinue it, the condition being that the defendant should give him a new note of $90; that, after signing the stipulation to discontinue, the defendant refused to give the new note. The defendant claims that the Dicks note was given in payment; that it was never protested, so as to hold him as an indorser; that he never agreed to give a new note as a condition to a discontinuance of the former suit, but that the whole agreement was contained in the stipulation. At the close of the trial, the defendant asked the court to charge substantially:

1. That the defendant was not liable as indorser upon the note.
2. That, if the defendant turned the note over to plaintiff in payment, the plaintiff could not recover.
3. That, if the settlement was deliberately made between the parties, it was binding upon them.

The court charged that, if the note was taken as payment, the plaintiff could not recover; that, if the parties settled their controversies, that must end the case; but that if the jury found that a fraud was practiced upon the plaintiff in this settlement, and the note was taken as collateral security merely, and not as payment, the plaintiff should recover.

It is contended that the court permitted the case to go to the jury upon an entirely different theory than that claimed in the declaration. We think not. The second or special count of the declaration sets up the second theory of the plaintiff's claim; that is, that the defendant agreed to give a new note upon the discontinuance of the case. The jury evidently found that the original note

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was taken as collateral security, and that the defendant agreed to give the new note upon a settlement and discontinuance of the original suit, and held the defendant liable for the payment which he agreed to make. We think there was evidence to sustain this contention, and that the case was fairly submitted upon this theory.

The judgment is affirmed.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## FARMERS' FIRE INSURANCE CO. *v.* JOHNSTON.

1. EQUITY—COLLECTION OF JUDGMENT—INJUNCTION—RES JUDICATA.

   An insurance company which has unsuccessfully defended an action upon a policy, payable to a mortgagee as his interest may appear, upon the ground of misrepresentation with reference to the ownership of the mortgage, cannot have the question retried in equity upon a bill to enjoin the collection of the judgment.

2. SAME—PLEADINGS—AMENDMENT.

   The fact that the company was not allowed in the action at law to put in all of its proof, because of the condition of its pleadings, cannot be urged in support of the equitable remedy, where it does not appear that it asked leave to amend its pleadings so as to render such proof admissible.

3. COSTS ON APPEAL—SOLICITOR'S FEE—SEVERAL DEFENDANTS.

   Upon affirmance in the Supreme Court of a decree dismissing a bill to enjoin the collection of a judgment, the defendants in which represented different interests, costs, including separate solicitor's fees, were awarded to each against the surety on the appeal bond as well as against the complainant.

Appeal from Wayne; Carpenter, J. Submitted June 8, 1897. Decided June 28, 1897.

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Bill by the Farmers' Fire Insurance Company against Cyrus Johnston and others to enjoin the collection of a judgment upon a policy of insurance. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

*E. T. Wood* and *Willis G. Clarke*, for complainant.

*S. E. Engle*, for defendants Johnston and Dehn.

*William Stacey*, for defendants Cartwright.

MOORE, J. Complainant commenced this proceeding by filing a bill in chancery. Defendants demurred to the bill, Judge Carpenter sustained the demurrer, and complainant appeals. In disposing of the demurrer, Judge Carpenter made a statement of the questions involved in this proceeding:

"Complainant insured defendants Cartwright Bros. against loss by fire on a stock of goods, with loss payable to defendant Johnston as his mortgage interest might appear. This stock of drugs burned. Johnston, as assignee of the Cartwrights, brought suit against complainant and recovered judgment. The Supreme Court affirmed that judgment. 106 Mich. 96. Subsequently Johnston and the Cartwrights differed as to their respective interests in the judgment, and the Cartwrights commenced a suit on the equity side of this court against Johnston and complainant to determine their differences, and to compel complainant to pay according to that determination. Complainant thereupon filed an answer, claiming the benefit of a cross-bill, praying that the judgment against it be declared void. The other parties to this suit demurred to that bill. The demurrer was sustained both in this court and the Supreme Court. 110 Mich. 312. The Supreme Court decided that a decree made before complainant had appeared, adjudging to defendants Cartwright $424.23, and to defendant Johnston the balance of said judgment, operated as a discontinuance, and that complainant was left to pursue such remedy as it deemed advisable by independent suit.

"Complainant thereupon commenced this suit, charging that, about two weeks before the insurance in question was effected, defendant William A. Dehn sold to said

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Cartwright Bros. the stock subsequently insured; that said Dehn deceived them as to its value; that the property was not worth over $500, while the Cartwrights paid $500 in cash, and gave Dehn their note for $1,500, and secured its payment by a chattel mortgage on the property; that the title to this note and the beneficial interest therein always remained in said Dehn; that this fact was well known to Johnston, and both of the Cartwrights knew that said note and mortgage had been given to Dehn; that, when the insurance was applied for, defendants Johnston and John O. Cartwright stated to the complainant that the title to said note and mortgage was in defendant Johnston, and no mention whatever was made of defendant Dehn's name; that defendant Dehn had not a good reputation, and, if his connection with the property had been known, complainant would not have insured the property; that the true ownership of said note and mortgage was known only to defendants Johnston and Dehn and their counsel, and was not discovered by complainant until the suit in chancery heretofore referred to was commenced by the Cartwrights against Johnston and the insurance company. All matters appearing of record in the two former suits are made a part of the bill.

"The bill prays for a decree subrogating complainant to all the rights of the Cartwrights against Johnston and Dehn, and adjudging the note, chattel mortgage, and insurance policy and judgment void. Defendants demur, and the question is whether the case made by the bill entitles complainant to relief. It is claimed that the insurance policy and judgment are void because Dehn held the note and mortgage when the insurance was effected; that the note and mortgage are void because of the fraud practiced by Dehn on the Cartwrights. We will consider separately:

"1. Can the judgment be avoided because the title to the note and mortgage was in Dehn? In my opinion filed March 17, 1896, in the suit of *Cartwright* v. *Johnston*, I stated my reasons for the conclusion that the policy was not void if the Cartwrights named the one whom they believed owned the mortgage on their property. I still adhere to that opinion. It is not averred in this bill that the Cartwrights did not believe that Johnston owned the mortgage. On the contrary, it is therein distinctly averred that, so far as this complainant could learn, the true ownership of said note and chattel mortgage was known only to said Cyrus Johnston and to said William Dehn

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and their counsel. If it be argued that the Cartwrights failed in their duty, in not informing complainant that the note and mortgage had been given to Dehn, or that the circumstances indicate that they believed Dehn the owner when this insurance was effected, it is a sufficient answer to say that all these facts upon which either of these claims can be based appeared on the trial of the lawsuit on the insurance policy, and an opportunity was thereby afforded to use them as a defense.

"2. Can the note and mortgage be set aside, or the amount evidenced thereby reduced, because Dehn deceived the Cartwrights as to the value of the insured property? It is alleged that, two weeks before the insurance was effected, Dehn sold the property to the Cartwrights for $2,000, when it was worth but $500. The Cartwrights do not complain of this fraud. It is claimed, however, that complainant should be subrogated to the rights of the Cartwrights, and be permitted to complain of it. In an opinion filed April 9, 1896, in *Cartwright* v. *Johnston*, I stated that the Cartwrights had elected to affirm their contract, and, if complainant were subrogated to their rights, it would be bound by this election. The principle announced in that, whether or not it was abstractly correct, was not decisive of the case. It assumed that, if the Cartwrights had waived their right to rescind, they had no remedy for the fraud. Clearly, they would still have the right to recover in an action on the case the amount they were damaged by the fraud. We are bound, then, to consider the question, Can complainant be subrogated to the Cartwrights' right to complain of Dehn's fraud? The right of subrogation is given in order that a loss may be transferred to the party whom equity deems primarily liable. In no sense is Dehn primarily liable for the loss sustained by complainant. The representations of Dehn to the Cartwrights had no effect on any of complainant's rights. Those representations had nothing to do with the contract of insurance. The only representations of value of which complainant can complain are those upon which it effected the insurance, and in the suit at law, when these representations were investigated, it was judicially determined that the property was worth $2,000. The authorities holding that an insurance company may be subrogated, in case of loss of the insured property, to the insured's right of action against the person whose misconduct or negligence caused the loss, are clearly inapplicable.

"My opinion that the right of subrogation does not ex-

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ist in this case is very much strengthened by the fact that the able and industrious counsel of complainant fail, in my judgment, to find any authority supporting their position. Of the cases they cite, *Hibernia Ins. Co.* v. *St. Louis, etc., Transp. Co.*, 10 Fed. 596, 13 Fed. 516, and 17 Fed. 478, is nearest in point. Respecting that case, I quote from the brief of complainant's counsel the following clear and concise statement: 'In this case it was held that an insurance company, upon payment of insurance, might be subrogated to the rights of the insured against a transportation company for negligence, and might, before recovering judgment on the claim for negligence, file a bill against the transportation company to set aside a transfer of its property for fraud. The fraud consisted in this: The transportation company, against which the insurance company's claim existed, reorganized under another name, with substantially the same parties in interest as stockholders. The old company transferred all its property to the new, with intent to defeat the claim of the insurance company.' That case is clearly distinguishable from this. There the fraud attacked was fraud towards complainant,—not, as in this case, as already shown, fraud towards a third person. The right to complain of Dehn's fraud was the personal right of the Cartwrights, which they could not assign (*Smith* v. *Thompson*, 94 Mich. 385), and which, in my judgment, equity would not assign for them.

"I do not think the bill makes a case, and the demurrer must be sustained."

Many of the questions involved in this litigation have been in this court twice before. *Johnston* v. *Insurance Co.*, 106 Mich. 96; *Cartwright* v. *Johnston*, 110 Mich. 312. The complainant's bill makes the records in these cases part thereof, so that it becomes necessary, in disposing of this proceeding, to take notice of what was done in those cases. In the law case the question was left to the jury to determine the value of the property which was insured, and they found it to be worth at least $2,000. An inspection of the law record also shows that it was then the claim of counsel for the insurance company that the chattel-mortgage interest of $1,500 was in Dehn, and not in Johnston, and for that reason Johnston could not

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recover. The counsel for the insurance company prepared a request to charge which reads as follows:

"The evidence discloses that W. A. Dehn has a chattel-mortgage interest of $1,500 in the insured property, which was represented by the insured to belong to Cyrus Johnston, which is a misrepresentation, within lines 7 and 8 of the policy, and is in violation of the provisions of line 18 of the policy, and therefore avoids the policy, and the verdict of the jury should be for the defendant."

Another request reads as follows:

"The declaration avers a chattel-mortgage interest of $1,500 in C. Johnston. The evidence discloses a chattel-mortgage interest of $1,500 in W. A. Dehn, which is a variance. Therefore the verdict of the jury should be for the defendant."

This would indicate that, as early as during the trial of the law case, the defendant company had knowledge that Dehn claimed an interest in the chattel mortgage, and that the defendant company sought to defeat Johnston's recovery for that reason. The company, through its attorneys, now says that it did not, at the time of the law trial, suspect Dehn's interest; that the testimony left the chattel mortgage in Dehn, but the insurance company never deemed it true, but sought to take advantage of it to compel the putting of these very men on the stand. They also say that it was not their claim that the showing that the title to the chattel mortgage was in Dehn was a fraud upon the company, but simply that it was a variance between the pleadings and proofs. We do not think a reading of the requests prepared by counsel will sustain any such contention. It was the claim of the defendant that a misrepresentation had been practiced upon the company, in relation to this chattel mortgage, sufficient to avoid the policy; so that we think the question of fraud was raised as early as the trial of the law case, which case was tried in November, 1894. It is certain that evidence appeared in that contention to put defendant upon inquiry, and that, having raised the question at that time, it was bound to go into it fully.

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In *Gray* v. *Barton*, 62 Mich. 196, it is said:

"Equity will not relieve a party against a judgment at law, on the ground of its being contrary to justice, unless the defendant was ignorant of his defense pending the suit, or facts could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defense."

It is urged by complainant that it was not allowed by the judge, in the suit at law, to put in all its proof, upon the ground that its pleadings were not in condition to permit it to do so. There is nothing in the record to indicate that it asked to amend its pleadings so that it might put in such testimony as it had at hand, nor does the record disclose that it used such diligence as it ought after the knowledge came to it that Dehn claimed an interest in the chattel mortgage.

We do not think a mere allegation by the complainant that a fraud has been committed, and that it can now establish the fraud upon a retrial, when it appears from the record that the question of the same fraud was raised in the former trial, will authorize a court of equity to interfere, after the judgment against the complainant in the court of law has been affirmed by the highest tribunal. To do so would open the way for another contest in equity of nearly every suit at law where the defeated party insists that his defeat was brought about by improper methods. In *Miller* v. *Morse*, 23 Mich. 368, it is said:

"Generally courts of equity do not permit cases to be retried therein which have already been disposed of in the courts of law upon the very point made by the bill. To do so would be to assume an appellate jurisdiction, which by the law is not conferred upon them. *Simpson* v. *Hart*, 1 Johns. Ch. 95. The jurisdiction to grant new trials is exercised only when the judgment recovered is against conscience, and when the applicant had no opportunity to make defense, or was prevented by accident from so doing, or by the fraud or improper conduct of the opposite party, and without fault on his own part."

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We do not think the case stated by the bill, construed in connection with the records in the two cases which have been here before, which are made a part of said bill, calls for any interference by the court of equity.

The interests of Cartwright and Cartwright, who appear by one solicitor, and Dehn and Johnston, who appear by another solicitor, are not identical, and they will be decreed costs of both courts; each of said solicitors for said defendants to have a solicitor's fee. Costs are awarded against the surety on the appeal bond as well as against the complainant.

The decree is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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JONES *v.* MERRILL.

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1. SERVICE OF PROCESS—ACCEPTANCE—JURISDICTION.
   An admission of "due personal service" of subpœna by a defendant in another State is sufficient to confer jurisdiction upon a court of this State.

2. SAME.
   It seems that the bare admission of the *fact* of service beyond the territorial jurisdiction of the court would not be deemed sufficient.

3. EJECTMENT—BETTERMENTS—SUFFICIENCY OF OCCUPANCY.
   A defendent in ejectment who, before the commencement of the action, entered upon the premises in good faith under color of title, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house, is within 3 How. Stat. § 7836, providing for compensation for improvements made by defendants in ejectment who shall have "occupied" the premises for a less time than six years under color of title and in good faith.



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4. SAME—GOOD FAITH—QUESTION FOR JURY.

Where the circumstances are such as to throw doubt upon defendant's good faith, the question is one for the jury.

Error to Muskegon; Russell, J. Submitted June 8, 1897. Decided June 28, 1897.

Ejectment by Susan L. Jones against Esther E. Merrill. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

*Philip W. Niskern*, for appellant.

*Chamberlain & Cross*, for appellee.

MONTGOMERY, J. Ejectment for a house and lot in the city of Muskegon. Plaintiff claims title under a foreclosure in equity of a mortgage executed by Melissa C. Livermore. Defendant claimed, at the time of the entry hereinafter referred to, under a commissioner's deed executed in pursuance of a sale under certain chancery proceedings, the nature of which is not very clearly shown in the record. Defendant also filed a claim for compensation for improvements made upon the premises. Two questions are presented: *First*, whether the foreclosure under which plaintiff derives title was valid; and, *second*, whether the defendant had such possession when the improvements were made upon the land as entitled her to recover the increased value of the premises by reason of such improvements, or, more accurately, whether there was evidence for the jury tending to show such occupancy and the good faith of defendant.

1. The validity of the foreclosure proceeding depends wholly upon the question of whether the court obtained jurisdiction by an acceptance of service signed by the defendant in that proceeding in Montana. The language of the acceptance indorsed upon the subpœna was as follows:

"I hereby admit due personal service upon me of the within subpœna this 11th day of September, 1894.

"MELISSA C. LIVERMORE."

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We had occasion to refer to this subject in *Allured* v. *Voller*, 107 Mich. 476. In that case it appeared that there was an acceptance beyond the jurisdiction of the court, in which acceptance there was also a waiver of formal service by an officer, and a permission to the plaintiff to proceed with the case the same as though service had been made as commanded in said summons. As was said in that case, the authorities are not harmonious upon the subject of a mere acceptance of the service of a writ beyond the jurisdiction of the court. It became unnecessary for us to determine the effect of such acceptance in that case, as we deemed that there was an express waiver and authority in writing conferred upon the plaintiff to proceed with the case. In the present case it is unnecessary to determine the effect of a mere acceptance of a service shown upon its face to be beyond the jurisdiction of the court. In this case the acceptance purports to be an acceptance of *due* personal service, which means a service which will confer jurisdiction upon the court. The case of *Cheney* v. *Harding*, 21 Neb. 65, goes further than is necessary to sustain the holding of the circuit judge in this case. In that case the admission of service showed upon its face that the service was made at the residence of the party, in another State. Yet the court held that the defendant was bound by such acknowledgment or acceptance of service, even though outside the territorial jurisdiction of the court to which it was returnable.

In the early case of *Dunn* v. *Dunn*, 4 Paige, 430, Chancellor Walworth said:

"In all cases where the court has jurisdiction over the subject-matter of the suit, if the defendant, who is beyond the limits of the State, thinks proper to waive that objection by a voluntary appearance, or by consenting to accept as regular the service of process upon him at the place where he resides or is found, he cannot afterwards object to the regularity of the proceedings against him, founded on such service."

In the case of *Vermont Farm-Machine Co.* v. *Marble*, 20 Fed. 117, it appeared that the defendant accepted ser-

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vice of the subpœna, "to have the same effect as if duly served on him by a proper officer." It was held that in so accepting service the defendant subjected himself to the jurisdiction of a court sitting in a district of which he was not a resident. See, also, *Ex parte Schollenberger*, 96 U. S. 369; *Laramore* v. *Chastian*, 25 Ga. 592; *Shaw* v. *National State Bank*, 49 Iowa, 179. The case of *Weatherbee* v. *Weatherbee*, 20 Wis. 499, distinctly holds the opposite doctrine. But that case is in conflict with our own holding in *Allured* v. *Voller*, and an attempt was made to distinguish it in *Keeler* v. *Keeler*, 24 Wis. 522. We think it an entirely safe rule that a party may waive service of process by any act clearly evidencing an intention to do so. The bare admission of the fact of service beyond the territorial jurisdiction of the court should not be deemed a waiver. But an admission of service so worded as to clearly evidence an intent to waive further service should be held to amount to a waiver. Such intent is clear in the present case.

2. The defendant offered evidence to show that, before the commencement of the action of ejectment, she entered upon the premises, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house. She sought to recover for these improvements. The circuit judge was of the opinion that she had not shown such occupancy as is contemplated by section 7836, 3 How. Stat., which provides for compensation for improvements made by defendants in ejectment who shall have been in the actual, peaceable occupation of the premises for six years before the commencement of the action, or who shall have occupied for a less time than six years under a color of title and in good faith. We think by this term "occupancy" is meant such an occupancy as, under the rules of the common law, would entitle one to acquire a title by adverse possession. It must be actual, open, and peaceable. But this does not necessarily imply that the claimants shall have actually lived and made their home upon the disputed property.

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If it were constantly worked year after year, if cropped, or if shrubs and trees were planted and cared for, and such attention given as they required, or if fences were built, such an occupancy is actual, rather than constructive, and is such an occupancy as the statute contemplates.

It is doubtless true that there is enough in this record to throw some doubt upon the defendant's good faith, but this would be a question for the jury. *Miller* v. *Clark*, 56 Mich. 344.

We think there was error in excluding the evidence of defendant upon this branch of the case, and that for this error the judgment should be reversed and a new trial ordered.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## DESMOND v. MYERS.

TRUSTS—FRAUDULENT CONVEYANCES—CONSIDERATION.

Property taken by a husband in the name of his wife under a verbal agreement that such conveyances should thereafter be made as he should be advised would vest title in them jointly, and subsequently deeded to a third person to be reconveyed to the husband and wife, will not be subjected to the claims of creditors of the wife, who levy thereon after the agreement has been carried out in good faith, merely because the wife, under 2 How. Stat. § 5569, providing that no trust shall result in favor of a person furnishing the consideration for a conveyance to another, was at liberty to refuse to carry out the parol agreement.

Appeal from Wayne; Lillibridge, J. Submitted June 8, 1897. Decided June 28, 1897.

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Bill by Frank C. Desmond against Lucy A. Myers and Jefferson P. Myers in aid of execution. From a decree dismissing the bill, complainant appeals. Affirmed.

The following finding by the court is a good and sufficient statement of the case, and we adopt it:

"This is a bill in aid of execution. The complainant obtained a judgment for $227 against the defendant Lucy Myers, and he has levied to satisfy that judgment upon a certain lot described in the bill of complaint. Now, the levy was made on the 13th day of May, 1896. Prior to the 20th day of December, 1895, that lot stood in the name of Lucy Myers. On the 20th day of December, 1895, Lucy Myers, in pursuance of an agreement or arrangement between herself and her husband, which the testimony shows was contemporaneous with the taking of that title in herself, conveyed that property to one Smith, and Smith, in pursuance of the same arrangement, deeded it to Mrs. Myers and Mr. Myers. The testimony is uncontradicted here that, when this lot 13 was bought, Jefferson Myers furnished the consideration for it,—the entire consideration; and that he took that deed in the name of his wife with the intention of creating a homestead, and ultimately taking title in the name of himself and wife as joint tenants. Now, while it is true that section 5569 of the statute provides that Jefferson Myers might not have had an action against his wife which he could enforce against that property, yet it is established, as I think, by the cases which have been cited from the Michigan Reports, that such an arrangement or understanding or agreement between a husband and wife is valid, and that, if the conveyance is made subsequently in pursuance of that, it is not a fraud against creditors. Now, I see no reason to doubt the testimony of Mr. Myers in the case. In fact, I believe it,—that he did furnish the consideration for this property, and Mrs. Myers furnished no money for it, and that he took the title as he states, with the intentions stated by him. It appears that this arrangement was carried out the 20th of December, 1895, and that judgment in this case against the defendant was rendered May 1, 1896, so that I do not perceive any actual or legal fraud in the transfer of this property to Jefferson Myers and his wife."

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*Charles C. Stewart*, for complainant.

*Jonas B. Houck*, for defendants.

GRANT, J. (*after stating the facts*). Mr. Myers had no enforceable trust in this land. 2 How. Stat. § 5569:

"When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

But Mrs. Myers recognized her moral obligation to carry out the parol trust reposed in her by her husband. She executed it by deeding the land before complainant had obtained any lien upon it. Such a trustee is entitled, in both law and morals, to recognize the trust, and to convey to his *cestui que trust* at any time before a valid lien has been placed upon the land. Where such a transaction is, as in this case, stamped with honesty, the creditors of the trustee have no rights superior to those of the party who paid for the land, and to whom it had been conveyed before any lien has attached. Why should one keep for his creditors property which in honor belongs to another? *Popendick* v. *Frobenius*, 66 Mich. 317; *Cottrell* v. *Smith*, 63 Iowa, 181; *Patton* v. *Chamberlain*, 44 Mich. 5. When the trust, though not enforceable by reason of the statute, has been carried out, the question under the statute of frauds has been eliminated, and becomes immaterial. *Sackett* v. *Spencer*, 65 Pa. St. 89; *Barber* v. *Milner*, 43 Mich. 248; *Moore* v. *Crawford*, 130 U. S. 122. In the last case, at page 129, the court say:

"There is no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally, but not legally, bound to do a certain act or thing, upon the act or thing being done, to recall it, to the prejudice of the promisee,

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on the plea that the promise, while still executory, could not, by reason of some technical rule of law, have been enforced by action."

We, of course, are not passing upon a case where there is actual fraud, or where credit has been extended by the creditor upon the faith that his debtor owns the land.

Decree affirmed, with costs.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## FORD *v.* CHEEVER.[1]

1. TRIAL—JURORS—VOIR DIRE.
   The trial judge may limit, reasonably, the extent of the *voir dire* examination of jurors.
2. SAME—REMARKS OF COUNSEL—APPEAL.
   The Supreme Court declined to reverse a judgment because of objectionable remarks of counsel, made in the course of the examination of witnesses and the argument to the jury, where the trial court promptly informed counsel that the remarks were improper and should not have been made.

Error to Lenawee; Lane, J. Submitted June 8, 1897. Decided June 28, 1897.

Case by Emma Ford against Jacob Cheever under the civil-damage law. From a judgment for plaintiff, defendant brings error. Affirmed.

*Walter C. Burridge* and *Watts, Bean & Smith*, for appellant.

*J. C. Winne*, for appellee.

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[1] Rehearing denied November 23, 1897.

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MOORE, J. This case has been here before, and is reported in 105 Mich. 679. A reference to that case will show many of the questions involved here.

The first errors assigned relate to the *voir dire* examination of the jurors. An examination of the record shows that, while the trial judge sustained the objection to some of the questions put to the jurors, he also gave counsel so wide a latitude in the examination of the jurors that the rights of the defendant could not have been prejudiced. The trial judge must be allowed to place some limit upon the extent of the examination. The jurors to whom the questions were put were excused peremptorily by the defense, and, without examining other jurors, the counsel for the defendant announced themselves as satisfied with the jury.

It is also said that it was error to admit the deposition of Orrin T. Lane. It is sufficient to say that this objection was disposed of when the case was here before, and must be treated as *res judicata*.

It is insisted that the remark of plaintiff's counsel to John Lucas, who had just sworn he was a bartender, "You are ashamed of it, are you?" is prejudicial error. The record shows the court at once stated that the objectionable remark ought not to have been made. If a case is to be reversed every time counsel, in the heat of a trial, puts an objectionable question, even though the court properly and promptly corrects him, there will be no end of litigation. Error is also assigned to remarks made by counsel in his argument to the jury. Some of these remarks were objectionable, and the trial judge promptly so determined, and so informed the counsel. What we have just said as to the remark made by counsel to the witness will apply to these remarks.

It is claimed there is no substantial evidence that appellant furnished plaintiff's husband with liquor during the time mentioned in her bill of particulars. In view of the testimony of Mr. Lane that he had often seen Ford drunk, and had drunk often with him at Jacob Cheever's: "We

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drank liquor together there from the same bottle from the early fall of 1891, right along, while I lived there. We drank together at Cheever's very often, till I told Cheever of a conversation I overheard one night, and notified him not to sell Ford any more liquor. That was in October or November, 1891, I should think. I told Cheever that night that I heard two men talking just outside his door, about Ford's being drunk again. They said Ford had sold his pork, and was getting drunk on the money; that no other saloon keeper except Cheever would sell him liquor; that Cheever had better be careful, or he would have trouble. I told him the two men had made these remarks. I did not know them myself, but I described them so that he knew them. He thanked me for telling him, and we both had a drink together. Ford was then in his saloon very drunk, and I tried to have him go home, but could not get him started,"—this contention cannot be sustained. There was other testimony that tended to show appellant furnished Ford with liquor. The case was a proper one to be submitted to the jury.

The other assignments of error have had consideration, but we do not deem it necessary to discuss them further than to say that we do not deem any of them well taken. The record and assignments of error are presented in a very unsatisfactory way, and their examination has been attended with much more trouble than if they had been properly prepared.

The judgment is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## SOPER v. PONTIAC, OXFORD & NORTHERN RAILROAD CO.

CARRIERS—DAMAGE TO STOCK—BILL OF LADING—WAIVER OF CONDITIONS.

Evidence that a carrier received an unverified claim for damages from a shipper of stock, with a promise to give the matter prompt attention as soon as certain discrepancies were explained, and without any other objection than that the amount claimed was unreasonable, justifies the finding of a waiver of the requirement of its bill of lading that, in order to maintain a claim for damages to stock, a verified statement thereof must be served within five days after the removal of the stock from the cars.

Error to Huron; Beach, J. Submitted June 8, 1897. Decided June 28, 1897.

Case by Leander Soper against the Pontiac, Oxford & Northern Railroad Company for injuries to stock shipped over defendant's road. From a judgment for plaintiff, defendant brings error. Affirmed.

*Aug. C. Baldwin*, for appellant.

*George W. Clark* (*W. T. Bope*, of counsel), for appellee.

MOORE, J. Plaintiff shipped cattle and sheep over defendant's road. Part of the train containing the stock was thrown from the track, some of the animals were killed, and it was claimed others were injured. Plaintiff sued to recover for the value of the stock killed and the injury done to the others. He recovered a verdict of $133. The defendant appeals.

The only point open to discussion under the exceptions and assignments of error is whether the trial court erred in its disposition of the question of waiver. It is the claim of the defendant that, because of the conditions

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attached to the bill of lading, the plaintiff was bound to serve upon the defendant a verified statement of his claim within five days after the removal of the stock from the cars, and that, as he did not do this, he could not recover. The plaintiff claimed that this condition was waived by the letters, acts, and conduct of the defendant. The trial judge instructed the jury, in substance, that the condition attached to the bill of lading was a valid one, and that the plaintiff would be bound by it, unless the conditions had been waived by the defendant; and left it to the jury to say whether the conditions had been waived or not.

The record shows that the plaintiff's claim was put into the hands of his attorney within two or three days after the stock was removed from the cars, who at once made out the claim of the plaintiff, and delivered it to the station agent at Bad Axe. It was forwarded to Mr. Rosevear, who forwarded it to Mr. Sanford, the general superintendent of the defendant road. The claim was not verified. Correspondence then occurred between Mr. Sanford and Mr. Rosevear, and Mr. Sanford and the attorney for the plaintiff, Mr. Clark. Some of these letters could not be found at the time of the trial, but two of them were found, and received in evidence. They read as follows:

"PONTIAC, MICH., Dec. 18, 1895.

"W. R. ROSEVEAR, Esq.,
"G. F. & P. A., S., T. & H. R. R.,
"Saginaw, Mich.

"*Dear Sir:* Referring to the claim of L. Soper, your number 313, for damage sustained on account of the wreck of our stock train at Imlay City, November 23d, Mr. Soper claims that he suffered a loss of $133, but fails to specify just how the figures are made up, excepting the item of one heifer killed, $20, and seven sheep killed, $28. The balance of the amount is made up by the item of shrinkage on sheep, $35, and shrinkage on cattle, $50. Please request Mr. Soper to send me a detailed statement showing how he arrives at these figures, and particularly to state the number and initials of the cars the stock was loaded in on which he claims the damage.

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It is not my intention to seek to evade any just claim, but it seems to me that the amount claimed by Mr. Soper is unreasonable; hence my desire to learn precisely how the figures are arrived at.

"Yours truly,
[Signed] "W. C. SANFORD, Gen'l Supt."

"PONTIAC, MICH., January 6, 1896.
"GEO. W. CLARK, Esq.,
"Bad Axe, Mich.

"*Dear Sir:* Replying to your favor of the 4th inst., the papers in Mr. L. Soper's claim for damages on account of the wreck of stock train on our line November 23d are needed just now to complete our investigations, but will return them in a few days if desired. In the meantime the following are the items included in his bill: One heifer killed, $20; seven sheep killed, $28; shrinkage on sheep, $35; shrinkage on cattle, $50; total, $133. Attached to this claim are shipping bills for M. C. car 40,231, '34 cattle,' and M. C. car 40,222, '60 sheep and 21 calves.' The last-named car, 40,222, was not in the wreck, but went forward, and reached Buffalo at the usual time, Sunday afternoon, without any delay whatever, as far as this company is concerned; and as there were no sheep in car 40,231, I am at a loss to understand why Mr. Soper claims loss and damage on sheep. I will also state for your information that none of the stock in car 40,231 was killed or otherwise injured. We have an exact record of every car that was in the wreck, and the number of head of stock in each car. As soon as these discrepancies in Mr. Soper's claims are explained, I will arrange to give the matter prompt attention.

"Yours truly,
[Signed] "W. C. SANFORD, Gen'l Supt."

It will be noticed that Mr. Sanford does not seek to resist the claim upon the ground that a verified statement of the claim was not furnished in time, and there is nothing in the record to show that this defense was ever interposed until the time of the trial. On the contrary, the superintendent wrote: "It is not my intention to seek to evade any just claim, but it seems to me that the amount claimed by Mr. Soper is unreasonable; hence my desire to learn precisely how the figures are arrived at." "As soon as these discrepancies in Mr. Soper's claims are ex-

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plained, I will arrange to give the matter prompt attention." It is not at all certain, in view of the statements contained in these letters, that the trial judge would not have been justified in instructing the jury as a matter of law that the defendant had waived its right to insist upon a verified statement of the claim. *Marthinson* v. *Insurance Co.*, 64 Mich. 372; *Cobbs* v. *Fire Ass'n*, 68 Mich. 465; *Towle* v. *Insurance Co.*, 91 Mich. 226. The question, however, was submitted to the jury, and we do not think there is any ground for complaint upon the part of the defendant. *Hibernia Ins. Co.* v. *O'Connor*, 29 Mich. 241; *Cobbs* v. *Fire Ass'n*, 68 Mich. 463; *International, etc., Ass'n* v. *Walker*, 88 Mich. 62.

Judgment is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## KELLY *v.* BOWERMAN.

1. ASSIGNMENT OF RENTS—MORTGAGES.
   An assignment of rents of mortgaged property, to be received by the mortgagee and applied upon the mortgage, is valid.

2. SAME—ATTORNMENT.
   Where a lessor assigns the lease, the lessee is under legal obligation to pay the rent to the assignee; no formal act of attornment being necessary.

3. SAME—POWER OF ATTORNEY—REVOCATION.
   An instrument purporting to be a power of attorney, authorizing the attorney to collect the rents from mortgaged premises and apply them upon the mortgage, and assigning the rents, not only from the leases then in existence, but from those thereafter to be made, as security for the mortgage debt until it should be fully paid, is not revoked by the death of the mortgagor.

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4. MORTGAGES—CONSENT DECREE—ADMISSIONS—ADMINISTRATORS. A decree entered by consent in a foreclosure suit, adjudging that the mortgagee "has been and is in possession, and is entitled to the possession and control, of the premises, * * * and empowered to collect all rents," is a concession by the mortgagor that the mortgagee is entitled to the rents, which is binding upon the mortgagor's administrator.

Error to Wayne; Lillibridge, J. Submitted June 9, 1897. Decided June 28, 1897.

*Assumpsit* by John Kelly, Jr., against William J. Bowerman and another for rent. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Affirmed.

This is a suit brought by plaintiff in justice's court, February 9, 1885, as assignee of a lease executed by one Catherine Brennan to the defendants on May 16, 1894. Plaintiff recovered judgment in both justice's and circuit courts.

Mrs. Brennan was the owner of the property, and on August 24, 1895, borrowed of plaintiff $7,284, and gave him a mortgage to secure the same upon the real estate described in the lease. That mortgage contained the following provision:

"And it is hereby expressly stipulated and agreed upon, by and between the parties hereto, and as a condition precedent to the consummation of this loan, and as a part of the consideration of the same, that the said first party hereto assign, sell, and turn over unto said second party, or his authorized attorney, all the rents and profits of said premises; and the said first party, as an additional collateral security for the moneys hereby secured, does hereby sell, assign, and transfer to said second party, his agent or attorney, all the rents, issues, and profits of the said premises,—said second party being hereby authorized and empowered to collect the said rents and profits, and to receipt for the same, as fully as would the first party herein. Said rents and profits shall be applied on the debt herein secured, and this assignment shall continue, and be and remain in full force and effect, until all

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moneys secured hereby be fully paid, with all interest and expenses. This mortgage is made to secure all notes made by said first party to said second party, in addition to the above amount, at any time."

Plaintiff resided in New York, and his brother, Ronald Kelly, an attorney in Detroit, attended to the business. Under this mortgage, possession was given to the plaintiff through his brother, Ronald, who, until the time of the execution of the lease to defendants, had collected the rents, amounting to $2,872.75, and applied them upon the mortgage. After the execution of the lease to defendants, Mrs. Brennan delivered the lease to Ronald Kelly, and he permitted her and her daughter, who for some reason unexplained executed the lease with her mother, to receive six months' rent. On May 5, 1887, Mrs. Brennan executed to Ronald Kelly a power of attorney, authorizing him to collect all the rents from these premises, and to apply the same upon the mortgage to the plaintiff. This power of attorney also contained a clause assigning all the rents from said premises as security for the interest and principal of the mortgage given to plaintiff, until they were fully paid. On February 2, 1895, plaintiff filed his bill in chancery for the foreclosure of this mortgage. Decree was rendered February 10, 1896, for $10,387.25. The solicitors for the defendants, who are now attorneys for the defendants here, consented to the decree. The decree contains the following provision:

"And it is further ordered, adjudged, and decreed that the said complainant has been and is in possession, and is entitled to the possession and control, of said premises, and to rent and lease the same, and to collect the rents of said premises, and to receipt for the same, and to apply said rents upon the debt secured by said mortgage, until all of the moneys due upon said note and mortgage be fully paid, and that the injunction heretofore granted by this court, restraining said defendants and their agents, etc., is hereby continued, and to be and remain in full force and effect until the further order of this court, or until after the sale of said premises by virtue of this decree, and said complainant is entitled to and em-

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powered to collect all rents now due or to become due from said premises, and apply them on the debt herein found due."

The court directed a verdict for the plaintiff.

*Fraser & Gates*, for appellants.

*Ronald Kelly* (*W. F. Atkinson*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). 1. The assignment of rents of mortgaged property, to be received by the mortgagee and applied upon the mortgage, is valid. *Michigan Trust Co.* v. *Lansing Lumber Co.*, 103 Mich. 402; *Reading* v. *Waterman*, 46 Mich. 109; *Morse* v. *Byam*, 55 Mich. 598; *Byers* v. *Byers*, 65 Mich. 600.

2. No formal act of attornment was necessary. Where the lessor assigns the lease, the lessee is under legal obligation to pay the rent to the assignee. *Perrin* v. *Lepper*, 34 Mich. 292.

3. The paper executed and delivered to Ronald Kelly for the plaintiff was something more than a power of attorney. If it were a mere power of attorney, the rule invoked by the defendants, that this power is revoked by death, might apply. But it also assigned the rents, and covered, not only the lease or leases then in existence, but also all that might thereafter be made. From the date of the mortgage to the death of Mrs. Brennan, she surrendered to the plaintiff the control of this property in accordance with the terms of the mortgage.

4. While the records and decree in the chancery case might have been excluded, we do not think it was error to admit them. The administrator is defending this suit. That decree is an acknowledgment that plaintiff "has been and is in, and is entitled to, possession and control of the premises, and to collect the rents." This is a concession of the plaintiff's right to the rents, and is binding upon the administrator.



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The court was correct in directing a verdict for the plaintiff.

Judgment affirmed.

Long, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## GRIMES *v.* WILLIAMS' ESTATE.

ATTACHMENT—WRONGFUL LEVY—JUDGMENT—BAR.

The recovery and collection of damages against a creditor for the seizure of property under a writ of attachment wrongfully sued out is a bar to the prosecution of a suit for the identical wrong against the estate of another creditor, whose attachment was in the officer's hands at the time of the levy for which recovery was had, and was levied upon the same property immediately thereafter.

Error to Ingham; Person, J. Submitted June 9, 1897. Decided June 28, 1897.

John Grimes presented a claim against the estate of James M. Williams, deceased, which was disallowed by the commissioners, and claimant appealed to the circuit court. From a judgment for defendant on verdict directed by the court, claimant brings error. Affirmed.

*Atkinson & Wiest*, for appellant.

*B. D. York* (*Otto Kirchner*, of counsel), for appellee.

MOORE, J. Appellant filed a claim before the commissioners on claims in probate court, which was disallowed. An appeal was taken to the circuit court, where, by direction of the court, the claim was also disallowed by the jury. Claimant appeals.

It is contended for the claimant that he suffered dam-

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ages by reason of having levies made upon his property under writs of attachment wrongfully sued out. The only items of the claim discussed in the briefs of counsel for appellant are: "Share of wheat at Wygant's, $234.50; share of wheat at Plunkett's, $376; damage to real estate, $60,810." So we may assume no claim is made as to the other items. The record discloses that attachment suits were commenced, in one of which Mr. Williams, the deceased, was plaintiff. In another of these suits Mr. Bowerman was plaintiff. With these writs of attachment in his hands, the sheriff levied on claimant's real estate, and upon the wheat in question. The Bowerman attachment was levied first. The wheat was afterwards taken under an attachment at the suit of Mr. Thoman against Mr. Grimes, and sold to satisfy an execution issued in the last-named attachment suit. The record also shows that the claimant afterwards sued Mr. Bowerman to recover damages for the wrongful levies. The declaration in that case was broad enough to cover the taking of the same property mentioned in the claim against the Williams estate. Mr. Grimes recovered a judgment against Mr. Bowerman in that action, and afterwards collected his judgment.

A great many questions are raised by counsel which it will not be necessary to discuss. It was the view of the trial court that, inasmuch as Mr. Grimes had recovered a judgment against Mr. Bowerman, which he had collected, for the identical wrong for which he now presents a claim against the estate of Mr. Williams, he cannot now recover from Mr. Williams. We think he was right in his interpretation of the law. *Stone* v. *Dickinson*, 5 Allen, 29 (81 Am. Dec. 727); *Boardman* v. *Acer*, 13 Mich. 77. See *Kenyon* v. *Woodruff*, 33 Mich. 315.

Judgment is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## McKENZIE *v.* A. P. COOK CO.[1]

1. EQUITY PLEADING—CROSS-BILL.
   The defendant in a bill to quiet title, involving a determination of the question of title between the parties, may assert his legal title by a cross-bill.

2. LIMITATION OF ACTIONS—STATUTES.
   The period in which title to land will become absolute by limitation depends upon the statute in force at the time the right of action accrues to the owner.

3. LACHES—ABANDONMENT OF SUIT.
   In the absence of evidence of an actual intent on the part of a plaintiff in ejectment to abandon his suit, mere delay, though long continued, in bringing the case to trial, will not be construed as an abandonment; at least where there has been no motion to dismiss for failure to prosecute.

4. EJECTMENT—CONVEYANCE BY PLAINTIFF—EFFECT UPON SUIT.
   A conveyance of the land by the plaintiff in ejectment does not operate to abate the suit, but it may still be prosecuted by the plaintiff or his representative, and a judgment in his favor will inure to the benefit of the grantee.

5. SAME—DEATH OF PLAINTIFF.
   The death of the plaintiff in ejectment does not abate the suit.

6. SAME—DEATH OF DEFENDANT—ABATEMENT—LIMITATIONS.
   The death of the defendant in ejectment abates the suit; but the statute of limitations does not run during the pendency of the suit, and under 2 How. Stat. § 8707, plaintiff may bring an action for the same cause at any time within one year after the suit is thus abated.

7. SAME—INJUNCTION BILL—ELECTION OF REMEDIES.
   A defendant in ejectment who files a bill in equity to enjoin the prosecution of the suit, plaintiff consenting by his answer that the question of whose is the superior title may be transferred to that forum, cannot invoke the doctrine of election of remedies to defeat plaintiff's right to a decree.

8. SAME—IMPROVEMENTS—OWNER'S OPTION.
   The owner of land is entitled, upon establishing his claim as against one who has held the land under color of title for a

[1] Rehearing denied November 23, 1897.

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number of years, and has made improvements thereon, to his election as to whether he will take the land, and pay the increased value due to the improvements, or abandon the land to defendant, upon payment by him of the value it would have had if no improvements had been made.

Appeal from Monroe; Kinne, J. Submitted June 9, 1897. Decided June 28, 1897.

Bill to quiet title by Amanda A. McKenzie and others against the A. P. Cook Company, Limited, and others. Defendants filed an answer in the nature of a cross-bill. From a decree for complainants, defendants appeal. Reversed, and decree entered on the cross-bill for defendants.

*George W. Radford*, for complainants.

*Taggart, Knappen & Denison*, for defendants.

MONTGOMERY, J. The original bill in this case was filed by Clark H. B. McKenzie in 1893. The land involved is an 80-acre farm in Monroe county, which was patented by the United States to Theron Skeel, July 1, 1835. Addison P. Cook acquired the Skeel title, October 16, 1848. The land was sold as delinquent for the taxes of 1854, 1856, 1858, and 1861. Three of these tax titles were vested in John S. Gregory, who took possession of the lands in 1862, and who continued in possession until he conveyed to McKenzie, in 1864. In 1878, Addison P. Cook commenced a suit in ejectment against McKenzie, who appeared and pleaded the general issue, and gave notice of his tax titles, and of a claim for improvements. In December, 1888, Addison P. Cook conveyed the land to the A. P. Cook Company, Limited. Mr. Cook died in 1889. In 1893, Percy T. Cook, as administrator of A. P. Cook, proceeded to revive the ejectment suit. Thereupon the original bill in this case was filed, for the purpose of quieting title to the land, McKenzie setting up his tax titles and adverse possession, averring that the ejectment suit had been abandoned, and that its revival by the administrator ought not to be per-

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mitted, and praying that defendants be enjoined from prosecuting the ejectment suit, and from selling or advertising the lands for sale. Defendants filed their answer in the nature of a cross-bill, alleging that the A. P. Cook Company, Limited, by a conveyance from A. P. Cook, held a perfect title to the land in question, and asking that its own title be quieted, and that the questions at issue in the ejectment suit be adjudicated. Complainant replied to the answer, and answered the cross-bill. Some depositions were taken, but, before the hearing was had, complainant, Clark H. B. McKenzie, died. The cause has been revived, and his wife and heirs at law have been brought in. The decree of the court below was in favor of the complainants, on the ground that the McKenzie title had become absolute by the statute of limitations.

1. A question is raised as to whether the defendant company can assert its legal title by cross-bill. We think it is open to the defendant to do so. The scope of complainant's bill was such as to call for a determination of the question of title between these parties. This being so, the defendant had a right to interpose by way of cross-bill, and ask the relief to which it was entitled in case the court should find against the complainants' title. *Griffin* v. *Griffin*, 112 Mich. 87; *Shields* v. *Barrow*, 17 How. 130; *Greenwalt* v. *Duncan*, 16 Fed. 35; *Watts* v. *Sweeney*, 127 Ind. 116; *Jones* v. *Thacker*, 61 Ga. 335; *Remer* v. *McKay*, 38 Fed. 164; *Logan* v. *McMillan*, 5 Dana, 484; *Hall* v. *Edrington*, 8 B. Mon. 47; 2 Daniell, Ch. Pl. & Prac. 1549.

2. The possession of McKenzie and those under whom he claimed began in 1862, and between that date and the commencement of the ejectment suit 16 years had elapsed. But, at the time of entry, the period of limitations was 20 years. The act of 1863, providing for a 10-year limitation when the land was held under tax title, did not take effect until January 1, 1864. As Mr. Cook's right to bring ejectment accrued in 1862, the period of limitations

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depended upon the act in force at that date. See *Stambaugh* v. *Snoblin*, 32 Mich. 296; *McKisson* v. *Davenport*, 83 Mich. 211. So that, if the complainants must rely upon an adverse possession which had ripened into title before the institution of the ejectment suit, their claim must fail. But their contention is that there can be added to the period, before the institution of the ejectment suit, the long period of time which has since elapsed, for the reason—*First*, that the ejectment suit had been abandoned before the equity suit was instituted; and, *second*, that, by the death of McKenzie, the ejectment suit abated, and that the effect of this abatement is to leave the parties as though no suit had been instituted.

3. After the ejectment suit was planted and was at issue, it was within the power of either party to bring the case on for hearing. Neither the plaintiff nor defendant saw fit to do so. The evidence does not show any actual intent on the part of Mr. Cook to abandon the prosecution of the case. It is true, there was a long delay, but no steps were taken to press the case to a hearing, and no motion in the case itself has been made to dismiss the suit for a failure to prosecute. If such practice is admissible in ejectment,—a point which we do not decide,—a motion should have been made in the case, while the court could fix such terms as might be reasonable. See 2 Shinn, Pl. & Prac. § 945; *Hill* v. *Webber*, 50 Mich. 142.

4. The conveyance by Addison P. Cook to the A. P. Cook Company, Limited, did not operate to abate the ejectment suit. Such suit might still be prosecuted by Cook or his representatives, and the judgment, if in his favor, would inure to the benefit of his grantee. *Michigan Central R. Co.* v. *McNaughton*, 45 Mich. 87; *Snyder* v. *Hemmingway*, 47 Mich. 549.

The death of plaintiff did not operate to abate the ejectment suit. 5 Enc. Pl. & Prac. 803.

5. The case must turn upon the question of the effect of the death of Clark H. B. McKenzie upon the action of

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ejectment, as it affected the running of the statute of limitations. Undoubtedly, the death of McKenzie abated the action. 5 Enc. Pl. & Prac. 825; *Hoffman* v. *St. Clair Circuit Judge*, 40 Mich. 351. The circuit judge was of the opinion that, upon the abatement of the ejectment suit by the death of McKenzie, the sole remedy of the Cooks was to institute a fresh ejectment suit, and that upon their doing so, if the period fixed by the statute of limitations had elapsed after the entry by McKenzie, and before the institution of such new suit, the plaintiff would be barred. Such a rule of law, it is evident, would work manifest injustice in many cases. The plaintiff in ejectment might have a perfect action today, and title to property; tomorrow, by the death of the defendant, his right would be cut off. The court should hesitate to lay down a rule which would lead to such consequences. Section 8707, 2 How. Stat., provides that—

"If any action of which the commencement is limited by this chapter shall be abated by the death of any party thereto, * * * the demandant or plaintiff, or any person claiming from, by, or under him, may bring an action for the same cause at any time within one year after the determination of the original action."

"The same cause" means, of course, the same entry. We think it clear that the statute of limitations was not running during the pendency of the ejectment suit, and that, the complainants themselves having resorted to a court of equity, equity should follow the law, and that it should be held that the Cook title has not been barred by the statute. Clark H. B. McKenzie, it appears, died May 19, 1895. Within the year fixed by section 8707, the defendants might have instituted a new action of ejectment, as we have seen. Instead of that, they did, within the same period, cause the present cause, in which the same issue was presented for determination, to be revived.

6. It is urged by complainants that A. P. Cook elected to press the remedy of ejectment, which is an action

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at law, and that this election was ratified by his administrator in 1893, and that defendants are bound by this election, and that it results that, when the ejectment suit is abated, the widow and heirs of McKenzie have a perfect title by adverse possession. We perhaps fail to understand the force of complainants' contention. The ejectment suit was certainly no waiver of defendants' claim of title. On the other hand, it was an assertion of it. Complainants sought another forum. Defendants consented that the question of which title was superior might be tried in that forum. We think the doctrine of election has no pertinence.

7. It not being contended that the tax titles were valid, and the proofs showing their invalidity, it follows from what has been said that the defendants are entitled to a decree. In settling the decree, the practice pursued in *Sherman* v. *A. P. Cook Co.*, 98 Mich. 61, will be followed. The defendants will be entitled to elect as to whether they will take the land, and pay the increased value of the land, by reason of the improvements, or abandon the land to complainants, upon payment by them of the value which it would have had no improvements been made or placed upon the property.

The defendants' witness Rousseau testified that the value of the land, in the condition it would have been in had no improvements been made upon it by McKenzie, would be $20 an acre, and its value in its present condition, with the improvements upon it, $40 an acre. We are disposed to adopt these figures, although there is testimony by one witness that he thinks the land would sell for $25 or $30 an acre if it were in the condition in which it was when McKenzie took it. But he based this upon the reason that "men do not have money to put in to buy improved farms, and they think they can improve it themselves, with the help of their boys, and work out a home from it." We think this partakes somewhat of conjecture, and are disposed to adopt the figures given by the witness Rousseau.

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The decree will be reversed, and a decree entered in this court in accordance with this opinion.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## CURTIS *v.* CLARKE.

VENDOR'S LIEN—SUCCESSION—WAIVER.

A wife, as executrix and sole legatee of her deceased husband, may enforce a vendor's lien upon real estate conveyed by him in his lifetime, although she has, for convenience, exchanged the notes originally given to him for the purchase price for new notes of like date and amount, payable to herself.

Appeal from Lenawee; Lane, J. Submitted June 9, 1897. Decided June 28, 1897.

Bill by Frances A. Curtis, as executrix of the last will and testament of George Curtis, deceased, against Helen J. Clarke, to enforce a vendor's lien. From a decree for complainant, defendant appeals. Affirmed.

*Watts, Bean & Smith*, for complainant.

*James W. Wightman* (*Lester H. Salsbury*, of counsel), for defendant.

MOORE, J. Complainant filed a bill in chancery, asking that a vendor's lien might be decreed against certain real estate for the purchase price thereof. A decree was granted as prayed. Defendant appeals.

The testimony is conflicting, but we think it is established, by a clear preponderance of the evidence, that the real estate in controversy was, in June, 1886, deeded by the complainant and her husband to the defendant and

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her husband. At the same time, and as a part of the same transaction, the defendant and her husband gave their notes for the full amount of the purchase price. Mr. Curtis, soon after this, died, leaving a last will and testament, in which he made his wife his sole legatee. Soon after the death of Mr. Curtis, simply for her convenience, the notes which had been given by the defendant and her husband were surrendered, and notes of like number and amounts, but with Mrs. Curtis named as payee, were signed by Mrs. Clarke and her husband, and delivered to Mrs. Curtis. These notes were dated back, so as to bear the same date as the notes originally given. There were seven of these notes, each being for $100. Two of them have been paid. Mr. Clarke afterwards died. His widow failed to pay the notes, and declined to secure them upon the real estate conveyed, and this action was brought.

The title to the real estate is in Mrs. Clarke, placed there by the complainant and her husband. Mrs. Clarke has known from the commencement that Mr. Curtis was not paid for the real estate. Mrs. Curtis now, as executrix and legatee under the will, stands in the place which Mr. Curtis would occupy if he were living. There is nothing in the record to show that either Mr. Curtis or Mrs. Curtis has, either expressly or impliedly, waived or discharged the vendor's lien which equity gives the vendor of real estate for its purchase price. See *Carroll* v. *Van Rensselaer*, Har. Ch. 225; *Appeal of Palmer*, 1 Doug. (Mich.) 422; *Converse* v. *Blumrich*, 14 Mich. 124 (90 Am. Dec. 230); *Dunton* v. *Outhouse*, 64 Mich. 419; 1 Perry, Trusts, §§ 238, 239.

The decree is affirmed, with costs of both courts.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## CORNELL *v.* CRANE.[1]

1. ASSUMPSIT—MONEY HAD AND RECEIVED—ASSIGNMENT OF MORTGAGE—RESCISSION.

   One who takes an assignment of a mortgage in reliance upon the representation of the assignor that it is a first mortgage may rescind the agreement upon discovering the falsity of the representation, and recover back the amount paid for the assignment in an action for money had and received.

2. FRAUD—ESTOPPEL.

   An assignor of a mortgage who falsely represents that it is a first mortgage, and that the property is good security, upon which representations he knows that the assignee relies in taking the assignment, cannot claim that the latter is not entitled to relief because he might have discovered the facts by an examination of the abstract of title.

3. SAME—LACHES—QUESTION FOR JURY.

   Whether an assignee of a mortgage was guilty of such laches as would prevent a rescission for false representations was a question for the jury, where it appeared that formal notice of rescission was served six months after the falsity of the representations was first ascertained, and that the intermediate period was largely occupied in obtaining information as to the facts, for which delay the assignor was in part responsible.

Error to Kalamazoo; Buck, J. Submitted June 9, 1897. Decided June 28, 1897.

*Assumpsit* by Hannah L. Cornell against Edgar A. Crane for money had and received. From a judgment for plaintiff, defendant brings error. Affirmed.

*E. M. Irish* and *Alfred J. Mills*, for appellant.

*A. M. Stearns* (*Dallas Boudeman*, of counsel), for appellee.

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[1] Rehearing denied September 15, 1897.

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MONTGOMERY, J. This is an action for money had and received. Although the record is voluminous, the real issues determined by the jury were simple, the facts are not much complicated, and the rules of law governing the case are well understood. The case, as made by plaintiff, was that in March, 1893, defendant held a mortgage of $2,200 on 160 acres of land in Van Buren county, which he represented was a first mortgage, and that the property was good security; that he at the time furnished to plaintiff a statement in writing, setting forth the facts in regard to the value of the land, in which appeared a statement that it was assessed for $3,000 for the year 1892, that its real value was $5,000, and its value at forced sale $4,000; that in December, 1894, Mr. Breck, of Paw Paw, who, it would appear, had been concerned in the matter of making this loan, died, and defendant sent word to plaintiff to bring in to him any Van Buren county mortgages which she had taken of him, as he was going to look matters up; that the assignment from defendant to plaintiff had not been recorded; that defendant took the assignment, saying it ought to be recorded; that a few days later he sent word to plaintiff to come again to see him, and then informed her that there was a prior mortgage on this property, which mortgage amounted to $2,237.90 on the face of it. At this time plaintiff charged defendant with representing at the time of the purchase that her mortgage was the first mortgage. Defendant denied this, and charged whatever fault there was in the matter to Mr. Breck, and disclaimed responsibility on his own part. Plaintiff testified that she returned to her home, examined the papers, and wrote a note to defendant, stating that the mortgage in question was assigned by defendant to her, and that Mr. Breck's name did not appear in the transaction, and she was unable to see how he (Breck) could be responsible under the assertion that the mortgage was the first mortgage. She testified that in these conversations the defendant did not inform her who held the prior mortgage, and that he stated to her that a part of the

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prior mortgage had been paid, but that he did not know how much. She also testified that defendant told her that he thought the property was sufficient to pay both mortgages.

Plaintiff, on the 13th of March, 1895, wrote to the mortgagor, stating that the interest was due March 6th, and, as she had not heard from him (the mortgagor), she wrote to remind him of it; further stating that she took the mortgage as a first mortgage, but found that she was deceived in the matter, and asking for information as to who then held the first mortgage, and as to how much was due upon it. In response to this, the mortgagor visited plaintiff at her home in Kalamazoo, and stated that he could never pay the two mortgages. She then took him to the office of her counsel. Plaintiff further offered testimony to show that from this on her counsel, Mr. Stearns, endeavored to see the defendant and adjust the matter with him; that he was told by defendant that he had papers in his possession which would show that plaintiff knew that the mortgage was not a first mortgage when she received it, and that negotiations for a compromise took place between the parties; that he had difficulty in finding defendant at first, but that finally, on the 29th of June, he served notice upon the defendant of a rescission of the contract, tendered back the interest which plaintiff had received upon the mortgage, and demanded a refunding of the money which she had paid. It was also claimed that the plaintiff asserted that the property was not in other respects as represented by the written statement, in that it was not of the value stated; that it was farther from a school-house than stated; and that there was not as much improved land as stated. It further appeared that there had been paid upon the original mortgage, at different times, namely, in May, 1893, and March, 1894, $1,039.

1. It is contended that the plaintiff cannot maintain this action upon the common counts in *assumpsit*. This proposition was not urged upon the hearing, and it is

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without force. See *Johnson* v. *Seymour*, 79 Mich. 156; *Coon* v. *Anderson*, 101 Mich. 295.

2. It is contended that the plaintiff had within her power the means of knowing that the mortgage in question was not a first mortgage, as an abstract of title was in possession of defendant, and furnished her when the transaction was closed. She testified, however, that she made no examination of the abstract of title, relying upon the defendant's representations; that, had she examined it, she would have known no more about it than before the examination was made. There is enough to show that defendant knew that plaintiff was relying upon the representations which he made, and, under such circumstances, it does not lie with him to charge plaintiff with negligence in ascertaining the true state of facts.

3. The point most urged is that the plaintiff did not act promptly in rescinding the contract, after ascertaining the facts. The general rule is that a party defrauded, who seeks to rescind, must act with reasonable promptness after discovering the facts. *Wylie* v. *Gamble*, 95 Mich. 564; *Western Electric Co.* v. *Hart*, 103 Mich. 483; *Condon* v. *Hughes*, 92 Mich. 367. But it is equally true that what is a reasonable time must depend upon the circumstances of each particular case, and what would be reasonable under one state of facts might not be under another. *Gridley* v. *Tobacco Co.*, 71 Mich. 532. And it has also been held that laches are not imputed during the time the parties are negotiating for a settlement. *Seymour* v. *Rolling Mills*, 56 Mich. 117. In this case there was evidence tending to show that the plaintiff had not, prior to the time that she placed the matter in the hands of her counsel, in March, 1895, full information as to the situation. She might well have preferred, if she should find that the prior mortgage had been paid in large part, and that the land was of the value represented, and was in fact good security for both mortgages, to have elected to redeem from the prior mortgage, or to have suffered the loss of a portion of her claim. According to her

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testimony, the representations made by defendant were that the property was sufficient to cover both mortgages, and that a portion of the prior mortgage had been paid. She had not the means of ascertaining what portion of the prior mortgage had been paid, as she did not know who held the mortgage, and it is certain that she did not know in fact how much remained unpaid upon the first mortgage. We think it was a question for the jury as to whether she acted with reasonable promptness in ascertaining these facts, and that it was not error to submit that question to the jury, under the circumstances of this case.

The jury were instructed, at the request of defendant, that a person who claims to have been defrauded must act promptly, and, if he would rescind the contract complained of, he must do nothing in affirmance of it after he ascertains the facts; and that if plaintiff, after being informed that there was a prior mortgage on this land, still preferred to look to Henry Kroegel, the mortgagor, for her interest money, she could not after that tender back the mortgage to Mr. Crane, and legally demand of him the money she had paid for the assignment. The jury were further instructed that if they found that plaintiff did not know of the first mortgage (at the time she purchased the mortgage in question), but, after learning of its existence, unreasonably delayed to rescind the contract, and elected to look to Mr. Kroegel for the payment of the mortgage, she would not be entitled to recover; and that if, after being informed of the facts, plaintiff still relied on getting the money from Mr. Kroegel, and endeavored to collect the interest from him, then she made her election that way, and could not afterwards resort to a rescission of the contract in order to get the money of defendant. We think these instructions sufficiently favorable to defendant, in view of the special circumstances of the case, which tended to show that plaintiff had not full information of the facts until March, 1895. We think the rule is not so rigid as to impose upon a party occupying the position of this plaintiff the duty to elect, so long

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as she did not know definitely what her election would imply, and particularly where the jury might well have found that the delay was occasioned by assurances, given by defendant, that the property was sufficient to cover both mortgages, and that a portion of the first mortgage had been paid, but that how much was not known.

4. Some criticism is made upon the manner of examination of defendant by plaintiff's counsel. We discover nothing in the record which we think would justify the court in either reversing the case upon this ground or passing criticism upon the conduct of counsel for plaintiff. We are not impressed that there was any purpose of violating the proper rules of procedure, or that any injustice was done to defendant by the course of examination.

We discover no error in the proceedings.

The judgment will be affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## STARK v. MILLER.

PUBLIC LANDS—RIPARIAN RIGHTS.

A grant by the government of a fractional quarter section of land does not give the grantee any right as a riparian owner to lands in an adjoining section, where the land granted does not border upon any lake or stream.

Error to Calhoun; Smith, J. Submitted June 9, 1897. Decided June 28, 1897.

Trespass *quare clausum fregit* by Herman Stark against German Miller and others. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.



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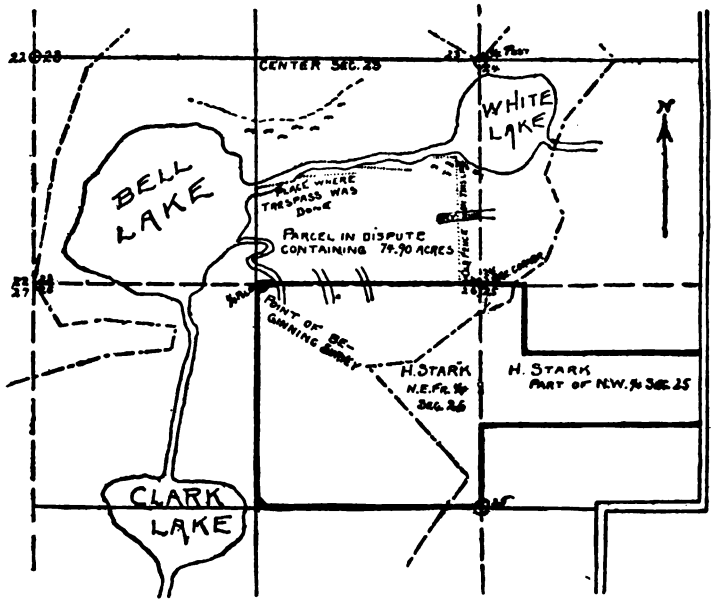
Plat showing S. part Sec. 23, N. part Sec. 26, S W. ¼ Sec. 24, and N. W. ¼ of Sec. 25, T. 1 S., R. 4 W., Calhoun Co., Mich.


CENTER SEC. 23
WHITE LAKE
BELL LAKE
PLACE WHERE TRESPASS WAS DONE
PARCEL IN DISPUTE CONTAINING 79.90 ACRES
POINT OF BEGINNING
H. STARK N.E. Fr. ¼ Sec. 26
H. STARK PART OF N.W. ¼ SEC. 25
CLARK LAKE

Explanation:

Section lines: — — — — — — — —

Meander: — · — · — · — · — · — · —

Heavy lines inclose land owned by Herman Stark.

*Adelbert Culver* (*A. M. Culver*, of counsel), for appellant.

*Powers & Stine*, for appellees.

MOORE, J. The defendants cut and carried away a quantity of wild marsh grass, which grew on the S. E. ¼ of section 23, in the township of Clarence, Calhoun county, Mich. The plaintiff sued them in an action of trespass. The trial judge directed a verdict in favor of the defendants. The plaintiff appeals.

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The accompanying plat will aid in understanding the situation.

The plaintiff has the record title to the N. E. ¼ of section 26, which is a fractional quarter section, containing, according to the government survey, a little less than 32 acres. The balance of the quarter section was wild marsh land. The United States has never granted the title to the S. E. ¼ of section 23 to any one. The N. E. ¼ of section 26 does not touch the shore of any lake or stream. So far as the record discloses, the land where the trespass was committed was uninclosed wild land. The only act of which complaint is made is the cutting and carrying away of wild grass growing in its natural state.

The plaintiff claims he has some rights as riparian owner, because the land adjoined the N. E. ¼ of section 26, to which he had record title. He was wrong in this contention. *Palmer* v. *Dodd*, 64 Mich. 474.

The plaintiff now complains that he was not allowed to show title to the land by possession. The record does not show that he made his offer in such a manner, or took such exceptions, as entitle him to have the action of the court in that respect reviewed.

Judgment is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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*In re* FRIEDRICH.

BAIL BOND—VALIDITY—CLERICAL MISTAKE.

A defect in a bond given by one arrested on a *capias ad satisfaciendum*, in stating that the principal was in custody by virtue of a "*capias ad respondendum*," does not entitle the principal to a discharge from custody when surrendered by his bondsmen, where the mistake was due to the attorney of such principal, and was corrected, with the consent of all parties interested, as soon as it was discovered, and the bond treated as a valid one.

*Certiorari* to Kent; Adsit, J. Submitted June 10, 1897. Decided June 28, 1897.

*Certiorari* by Charles Prange to review the action of the circuit court in discharging Paul W. Friedrich on a writ of *habeas corpus*. Reversed.

One Charles Prange recovered a judgment against Paul W. Friedrich in an action of tort for the fraudulent conversion of money. The action was commenced by a *capias ad respondendum*. A *fi. fa.* was issued, and returned *nulla bona*. A *capias ad satisfaciendum* was then issued March 8, 1892, upon which Friedrich was arrested by the sheriff, and gave a bond for the jail limits. On the following day the sheriff showed the bond to Prange's counsel, who objected to it on the ground that it recited that Friedrich was in custody by virtue of a *capias ad respondendum*. This bond was prepared by Friedrich's counsel, who, on being shown the bond, stated that it was a clerical error, and wrote upon the back of the bond the following: "The *capias* described in the within bond having by mistake of the scrivener been misnamed, we hereby consent that the wording of the said bond be changed to read '*capias ad satisfaciendum*,' where it now reads '*capias ad respondendum*.'" This

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consent was signed by both Friedrich and his bondsmen, and the sheriff changed the face of the bond to correspond. Friedrich remained within the jail limits, believing that he was a prisoner, until September 6, 1895, when he was surrendered by his sureties. He thereupon gave another bond, with other sureties, and remained within the jail limits until January 29, 1897, when these last bondsmen surrendered him to the sheriff. He thereupon sued out the writ of *habeas corpus*, and upon the hearing was discharged from custody.

*Birney Hoyt*, for appellant, Prange.

*Nathan P. Allen*, for Friedrich.

GRANT, J. (*after stating the facts*). This case is brought to this court upon the writ of *certiorari* to review the action of the circuit court in discharging Friedrich from custody. The return states the facts, but gives no reason for the discharge of the prisoner. Counsel for petitioner, Prange, states that the court held that the first bond for the jail limits was void, and that therefore the imprisonment was illegal. The bond was not void. The scrivener, who was Friedrich's own attorney, made a clerical mistake in drawing it. This mistake was at once corrected, by the consent of all the parties interested, and they all treated it as a valid bond. *Gunn* v. *Geary*, 44 Mich. 616, has no application to the facts of this case. A mere clerical mistake was made by Friedrich himself, through his attorney, and was, at his request and for his benefit, immediately corrected. Such worthless technicalities cannot be invoked to defeat the ends of justice.

The order of the circuit court is reversed, and the prisoner remanded to the custody of the sheriff.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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DETROIT BASEBALL CLUB *v.* PRESTON NATIONAL BANK.

APPEAL FROM JUSTICE'S COURT—EVIDENCE—DEATH OF WITNESS.

Where a witness in justice's court dies pending an appeal, evidence of what he testified to before the justice is admissible upon the trial at the circuit.

Error to Wayne; Donovan, J. Submitted June 9, 1897. Decided June 28, 1897.

*Assumpsit* by the Detroit Baseball Club against the Preston National Bank to recover a balance of deposit. From a judgment for plaintiff, defendant brings error. Affirmed.

*J. G. Dickinson*, for appellant.

*Gray & Gray*, for appellee.

LONG, C. J. The Detroit Baseball Club had been for some years engaged in giving exhibitions of baseball games, and in the fall of 1888, deciding to go out of business, made arrangements to wind up its affairs. James L. Edson was treasurer and Robert H. Leadley the secretary. The club's banking was transacted with the Preston National Bank. The moneys in bank were deposited in the name of the club, and checks against the deposit were signed by Mr. Edson. The check book was kept at the office of Mr. Leadley, and he filled out the checks, whereupon the check book was taken to Mr. Edson, and the checks signed by him and then issued by Mr. Leadley. There was more or less detail in the winding up of affairs, and not until December, 1889, was the club quite ready to close all matters. At a directors' meeting held in that month, a statement was made showing that there was on hand $7,176.32. A dividend of $17.50 a share ($7,000 in all) was declared. This left $176.32 in bank, as claimed by plaintiff.

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In 1889, Mr. Leadley became secretary of the Detroit Baseball Association, a new organization, which also kept its account at the Preston National Bank. He remained in that capacity until July 11, 1890, when the association retired from business, and he was employed by the Cleveland Club, whose duties kept him away from Detroit during 1890 and 1891. Some time in 1890 or 1891, Mr. Leadley took the plaintiff's pass book to the bank for balancing. It remained there some time. When, later, he called for the book, the bookkeeper said he could not return it, as some of the vouchers were missing, but stated that the balance was $76.32. Mr. Leadley at once replied that there was a mistake, as his books showed a balance of $176.32. Mr. Gray, who was acting as attorney for the plaintiff, testified that in the spring of 1892 he first learned of the discrepancy, and then went and asked Mr. Lerch, the bookkeeper, what the trouble was; he replied that the book was not written up because certain vouchers could not be found; that, later on, Lerch said he thought the vouchers would be found when the bank moved into the Moffat Block. Both Mr. Leadley and Mr. Gray swear positively that the bank, up to the fall of 1892, made no claim of vouchers returned or account rendered, and that objection was made to the $100 item as soon as attention was called to it.

The first suit was begun against the bank in September, 1892. On account of the serious illness of one of the bank's witnesses, that case, after repeated adjournments, was permitted to go down. Some time elapsed before the institution of the present suit, on account of the absence in Europe of Mr. Edson. In the fall of 1892, shortly after the commencement of the first suit, Mr. Lerch requested permission to examine the books and papers of the club. These records, and also those of the baseball association, were stored in a box at Mr. Leadley's house; and one evening the bank officers opened the box, and found among the papers eight of the missing checks, but not the $100 one in dispute. The explanation of Mr.

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Leadley as to these checks is that, after the breaking up of the association, its pass book and checks were returned to him, but he did not examine them, as he knew the association had no balance, and so no necessity existed for verifying the account; that the pass books and checks and other papers and records of both corporations were thrown into the box together, and that possibly the club checks found there were returned with the association checks and pass book; at any rate, he had no actual knowledge of the return of any until that evening. An account stated was made between the parties on January 1, 1890, at which time it was agreed that there was a balance of $648.82 to plaintiff's credit. Sixteen dividend checks drawn in December, and aggregating $472.50, were then unpresented, but were subsequently paid. The bank book was never, later, written up. When, in 1892, the bank began to write it up, only one check ($52.50, paid January 23, 1891) could be found in the bank's possession.

There was no dispute but that the bank paid a $100 check at the time claimed, but Mr. Leadley and Mr. Edson testify such check was not drawn by the Detroit Baseball Club, and that there was no occasion for drawing it, as all the debts had been paid. On the other hand, the bookkeeper of the bank, Mr. Lerch, testified that the check was signed by Mr. Edson. This question was submitted to the jury, and they found that Edson did not sign the check. This must dispose of that question, as there was some evidence to go to the jury upon it. But the bank further contends in its defense that there was an account stated. Mr. Edson and Mr. Leadley both testify that no account was rendered. This question was submitted to the jury under requests tendered by the defendant.

Some special questions are raised by the defense. It is contended that the testimony of Mr. Gray was incompetent, as to what Mr. Edson had testified to. It appears that Mr. Edson was examined as a witness in justice's court. Before the trial in the circuit he died, and Mr. Gray was called to show what Mr. Edson there testified

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to. This was properly permitted, and the testimony by Mr. Gray was positive that Mr. Edson there testified that he did not sign the $100 check, and that no account was ever rendered him by the bank showing the payment of the $100 check.

We have carefully examined this record, and are unable to find any error. The judgment must be affirmed.

MONTGOMERY and MOORE, JJ., concurred. GRANT and HOOKER, JJ., did not sit.

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## SLIGH FURNITURE CO. *v.* SHANNON.

ACTIONS—ASSUMPSIT OR TROVER—ELECTION.

A justice's summons recited that the action was "in a plea of trespass on the case upon promises, to plaintiff's damage $100 or under." The bill of particulars read: "The following is the plaintiff's bill of particulars for the recovery of which action is brought: * * * One bedroom suit * * * $52." A statement of account filed showed defendant's indebtedness to plaintiff to be $52, attached to which account was an affidavit that defendant was indebted in said amount, and that the consideration therefor was furniture. The declaration was in trover for the conversion of one bedroom suit, of the value of $52, and claimed damages in the sum of $100. After defendant had pleaded the general issue, plaintiff discontinued, and brought another action in trover. The defense proceeded upon the theory that plaintiff had elected to sue in *assumpsit*. *Held*, that the intention to sue in trover in the former suit was sufficiently indicated by the limiting of the *ad damnum* clause in the summons, the language of the bill of particulars, and the style of the declaration. *Thomas* v. *Watt*, 104 Mich. 201, distinguished.

Error to Alpena; Kelley, J. Submitted June 10, 1897. Decided June 28, 1897.

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Trover by the Sligh Furniture Company against George A. Shannon. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

*I. S. Canfield*, for appellant.

*James McNamara*, for appellee.

MOORE, J. This is an action of trover, brought for the conversion of a suit of furniture. Verdict was rendered in favor of the plaintiff by direction of the court. The defendant appeals, and assigns as error that the plaintiff, before the commencement of this suit, brought suit against the same defendant, relating to the same subject-matter, in an action of *assumpsit*, and that by bringing said action it had elected its remedy, and could not now bring this action; counsel citing *Thomas* v. *Watt*, 104 Mich. 201, and the cases there cited.

Some controversy arose over the admission of docket entries and verbal testimony, which testimony was excluded by the court; but the summons, the bill of particulars, and the affidavit attached thereto, and the declaration, filed in what is claimed to be the *assumpsit* case, were all admitted in evidence, and are made a part of the bill of exceptions. The summons is a justice's summons, in the form contained in the printed blanks, reciting the action to be "in a plea of trespass on the case upon promises, to its damage $100 or under." The material part of the bill of particulars reads:

"The following is the plaintiff's bill of particulars for the recovery of which said action is brought:

August 25, 1892. One bedroom suit, No. 557 ..... $52"

There was filed with the justice a statement showing:

"G. A. SHANNON, Alpena, Mich.,
To SLIGH FURNITURE COMPANY, Dr.
August 25, 1892, net 60 days ..... $52"

Attached to this was an affidavit to the effect that Shannon was indebted to the furniture company in the

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sum of $52, that the consideration therefor was furniture, etc. The declaration filed in the cause was a declaration in trover for the conversion of one bedroom suit, No. 557, of the value of $52, and claimed damages in the sum of $100. The plea was the general issue. After a short adjournment, this case was discontinued by the plaintiff, and on the same day the present suit was commenced, and, when the pleadings were put in, the same declaration was used in this case that had been filed in the case which is called an "*assumpsit* case."

While the statement of account, and the affidavit attached thereto, and some of the language used in the summons, used in the first case, would be what you would expect in an *assumpsit* case, the limit of the *ad damnum* clause in the summons to $100, the bill of particulars filed, and the declaration in trover which was filed, all indicate that it was not the intention of the plaintiff to commence an action in *assumpsit*, but that it was its intention to commence an action in trover; so that the case of *Thomas* v. *Watt* does not apply. As there is no dispute about the facts in the case, and the defense depended upon the theory that the first suit commenced was in *assumpsit*, we think the court did not err in directing a verdict in favor of the plaintiff.

Judgment is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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SAKOL *v.* RICKEL.

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MASTER AND SERVANT — DANGEROUS MACHINERY — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE.

An employé who, in the line of his duty, has frequently oiled a revolving shaft at a point within four inches of a set screw, although required to enter a dark recess for that purpose, cannot recover for injuries received by reason of his clothing coming in contact with the screw while he was leaning over the shaft, without a light, to perform another service.

Error to Wayne; Donovan, J. Submitted June 10, 1897. Decided June 28, 1897.

Case by Martin Sakol against Henry Rickel for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*S. E. Engle*, for appellant.

*Brennan, Donnelly & Van De Mark* and *Bernard B. Selling*, for appellee.

MONTGOMERY, J. Plaintiff sues for negligent injury. The defendant is one of the firm of H. W. Rickel & Co., engaged in running a malt elevator in the city of Detroit. The plaintiff was employed in the elevator, which was separate from the rest of the establishment of defendant. Louis Kemm was foreman of the entire plant. Whenever it was necessary to start the machinery in the elevator, it was also necessary to let the grain into the hopper, and the starting of the machinery and the running of the grain in the hopper made up part of the duty of the plaintiff. The slide by means of which the grain was permitted to pass into the hopper was in a recess of the main building of the elevator, and contained at one side the shafting upon which the main belt ran. The slide

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was above the shafting. Upon one end of the shaft there was a collar designed to keep the shaft steady, so that the cogs would match properly, and, to keep the collar on, a set screw was employed. The set screw was right at the entrance to the recess, and was in plain sight, and projected a scant inch. The plaintiff had worked in the little room containing this machinery during the entire winter of 1894–95, and during the fall of 1895, for several weeks, before he was hurt. He testified that, although he had never cleaned the shaft, he was the one who constantly oiled it and set it in motion. Plaintiff testified that he was the only man who worked on the machinery, with the exception of three weeks just before plaintiff was injured; "then there was another man, who mostly kept things clean; that was his work; he did not open the slide nor oil the shaft."

It was claimed by plaintiff that he did not see the set screw, because it turns around the shaft, and sometimes it might be up and sometimes down, and he could not see; that there were dust and oil and sprouts there covering it up; that he oiled the bearings some days once and may be twice a day, sometimes once in two days, as necessity arose; that he generally oiled the machinery while it was running, and in such a case used a lamp; that he used a lamp while it was running, because it was dangerous then; that he oiled the machinery in four places, one of which was three or four inches from the set screw; that he never noticed the set screw, because he never looked for it; that he had nothing to do with it.

The testimony on the trial was to the effect that plaintiff went into the little room while the machinery was running (he having started it himself) without a light, although he knew that it was dangerous to approach the running machinery in the dark. He then mounted the stepladder and leaned over the running machinery. His loose jeans jacket caught in something, supposedly the set screw, and he was wound around the shaft until the belt flew off. The plaintiff offered no proof that there was a

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safer manner of holding the collar upon the shaft. The circuit judge directed a verdict for defendant, and plaintiff brings error.

We think there was no error in this ruling. The case is on all fours with *Rooney* v. *Cordage Co.*, 161 Mass. 153. See, also, *Goodnow* v. *Emery Mills*, 146 Mass. 261; *Michigan Central R. Co.* v. *Smithson*, 45 Mich. 212; *Lamotte* v. *Boyce*, 105 Mich. 545.

Judgment affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## UNION TRUST CO. *v.* MABLEY & CO.

INSOLVENT CORPORATIONS—CLAIMS—PROMISE OF RECEIVER—CONSIDERATION.

An insolvent corporation executed a mortgage upon its goods and chattels in trust for certain creditors, and, upon application, a receiver was appointed. Other creditors attacked the transaction as fraudulent, among whom was a city, which threatened to take legal steps to secure a claim for taxes. The receiver thereupon assured the attorneys for the city that a prospective purchaser of the stock covered by the mortgage insisted, as one of the conditions of purchase, that the taxes be paid, and promised, if the city would forbear interfering with the sale by an attempt to enforce payment of the taxes, to reserve out of the proceeds the amount due. Upon the completion of the sale, the receiver, at the demand of the preferred creditors, denied liability upon the promise. *Held*, that the retention of the benefits of the sale, effectuated through the city's forbearance, rendered the agreement binding.

Appeal from Wayne; Donovan, J. Submitted June 10, 1897. Decided June 28, 1897.

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Bill by the Union Trust Company against Mabley & Company to foreclose certain mortgages. The city of Detroit intervened, praying that certain taxes due to it be paid from the proceeds of the sale. From an order granting the prayer of the intervener, complainant appeals. Affirmed.

The following facts are agreed to:

"On November 23, 1896, Mabley & Co., a corporation doing business in the city of Detroit, executed and delivered to the Union Trust Company, as trustee, three mortgages covering the goods and chattels owned by it in the city of Detroit, in trust for the benefit of its creditors, who were named in the mortgages. The trustee accepted the trust. On November 23, 1896, a foreclosure bill in the usual form, praying for the appointment of a receiver and a sale of the property, was filed by the mortgagee. On the same day the answer of Mabley & Co. was filed, admitting the allegations of the bill. An application was on the same day made for the appointment of a receiver. The application was granted, and the Union Trust Company appointed receiver. The receiver at once, on November 23, 1896, took possession of the mortgaged property. On December 5, 1896, after presentation of testimony, the court made a decretal order that the property in the hands of the receiver be sold for $160,000, except the property claimed by Cane, McCaffrey & Co., and, as to that, to sell whatever interest Mabley & Co. had in that property. On December 7, 1896, the Union Trust Company reported to the court that the order above mentioned had been complied with, and a sale had been made to W. S. Peck & Co. for the sum of $160,000, and on the same day the court made an order confirming said sale. January 19, 1897, a final decree was entered, directing the distribution to the creditors of $157,000, as their interests appeared, leaving the $3,000 in controversy in this proceeding in the hands of the receiver."

Mabley & Co. was at the time indebted to the city of Detroit in the sum of $2,626.30 for taxes, which were due July 1, 1896. Upon the completion of the sale under the order of the court, the $3,000 was left in the hands of

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the receiver, under the circumstances hereinafter detailed. The receiver, at the demand of the creditors, refused to pay the taxes, and the city filed its petition, asking the court to direct it to pay them.

The facts are to be found in the affidavits of Arthur Webster, and Charles D. Joslyn, counsel for the city, attached to the petition, and of Mr. Hance, attached to the answer of the receiver. Mr. Webster states that he went, a few days after the trust company had taken charge of the business, to its office, and was referred to its secretary, Mr. Hance; that he informed Mr. Hance of the amount of the taxes, and that, "while the city did not wish to cause Mabley & Co. any more trouble, still it would be necessary, in order to protect the city's interests, to levy upon the stock of Mabley & Co., and to take such steps in court as might be necessary to insure the payment of said taxes. Deponent was informed by said Hance that a settlement of the affairs of Mabley & Co. was even then pending, and that arrangements were being consummated to sell the stock of goods to W. S. Peck & Co.; that if the city levied upon the stock of Mabley & Co., or took any other steps to enforce the payment of these taxes, this would spoil the proposed sale, and he requested deponent not to take such steps. Said Hance assured deponent that the sum of $3,000 had been or would be laid aside with which to pay said taxes, interest, and charges in full." Deponent informed Mr. Joslyn of this interview, and they both then went to see Mr. Hance, who then assured them "that all the creditors, except those represented by Sloman, were coöperating to bring about the sale to W. S. Peck & Co., and knew that said amount had been reserved for the city; that no one would object, except possibly those represented by Sloman & Groesbeck, and they could not make any trouble, as the goods which they had sold Mabley & Co. were set apart, so that, if they were successful in their litigation, the goods could be returned to them; that said Hance then agreed that, if no steps were taken by the city of

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Detroit to enforce payment of said taxes, the said amount of $3,000 would be reserved to pay the said taxes, interest, and charges due the city from Mabley & Co. as soon as the sale to W. S. Peck & Co. was closed, to which said Joslyn and this deponent agreed."

Mr. Joslyn's affidavit is to the same effect, and says: "Said Hance assured deponent that the purchaser insisted, as one of the conditions, that the taxes be paid," and that he had several interviews afterwards with Mr. Hance in which he promised to pay.

Mr. Hance, in his affidavit, says that the statements made by Webster and Joslyn "are substantially correct, with the exception that this deponent did not give either of said parties to understand that said taxes would be paid by him as receiver, unless, as receiver, he had the legal right to do so; that deponent gave them to understand, and supposed that said Joslyn and Webster did understand, that the city would lose none of its rights by refraining from levying upon the stock of goods. Deponent did not intend to be understood as promising to pay the tax if the city had no right to levy upon the goods or to collect the tax by legal proceedings at that time. Deponent further says that he was well aware at the time that his powers as receiver were not broad enough to permit him to make a payment to the city of Detroit of moneys in his hands, unless the claim upon which the money was to be paid constituted a lien upon the property in his hands as receiver superior to that of the mortgages upon the same; and if said Webster and said Joslyn understood deponent to make any promises to pay said taxes in case they were not liens and could not have been collected at the time a levy was threatened, they entirely misunderstood deponent. Deponent further says that he did induce the representatives of the city of Detroit to refrain from making a levy upon the property of Mabley & Co. upon the 24th day of November, 1896, and that the rights of the city of Detroit should be determined as though a levy



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had been made upon that day, and that the city ought to lose no rights whatever by reason of its action in refraining from making a levy at the time above mentioned."

The contention on behalf of the creditors is thus stated:

"1. That any lien which the city could have acquired by a levy, after the receiver was in possession, would have been subordinate to the lien of the mortgage; and that, since the fund was held until the rights of the city could be determined, it suffered no harm by complying with Hance's request that it should not attempt to interfere with the goods.

"2. That the record shows no promise by the receiver to waive the paramount right of the beneficiaries under the trust mortgage to the goods and the fund arising from their sale.

"3. That, if Mr. Hance did promise to waive that right, he exceeded his authority, and the beneficiaries are not bound thereby."

*Russel & Campbell*, for complainant.

*Moore & Moore*, *Wells*, *Angell*, *Boynton & McMillan*, and *Elliott G. Stevenson*, for creditors, and of counsel for complainant.

*C. D. Joslyn*, for intervening petitioner.

GRANT, J. (*after stating the facts*). The city had no lien upon the goods, because no levy had been made, and, if the collector had threatened to levy, the receiver could have paid under protest, and maintained a suit to recover the money paid. *Lyon* v. *Receiver of Taxes*, 52 Mich. 276. It must follow that the receiver could not, of his own motion and without consideration, agree to the existence of a lien, and give it preference over the secured creditors. The difficulty is one not of law, but of fact. The situation was this: Mabley & Co. had failed. They had favored some creditors by mortgage. Other creditors attacked the transaction as fraudulent. Among them was the city, which threatened to take legal steps to secure its claim. The receiver was trying to make a sale. The secured creditors were anxious that the sale should

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be made. If the city took the action it proposed to, the sale could not be accomplished. The city would forbear action only upon the condition that the receiver would retain from the amount of the sale sufficient to pay these taxes. The purchaser would buy upon this condition only. The receiver agreed to it. Action by the city was forborne. The sale was accomplished and the money retained. The creditors cannot retain the benefit of the sale, and repudiate the terms upon which it was made, even if the receiver, acting for them, exceeded his authority. Mr. Hance does not deny the positive statements made by Webster and Joslyn. He only seeks to avoid their effect by giving his interpretation of them. This he cannot do. If we give the conceded statements their natural interpretation, we cannot escape the conclusion that the agreement to withhold this money for the payment of the taxes was made, and that without it the sale would not have been consummated. The arrangement was favorable to all parties interested, and must be sustained.

Order affirmed, and the receiver directed to pay the taxes out of the amount in its hands.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## McDONALD *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

RAILROAD COMPANIES—KILLING STOCK—FENCES.

Where it is necessary, for the common convenience of the public and a railway company, that the latter should leave unfenced a portion of its right of way where a spur joins the main track, it incurs no liability by reason thereof to the owner of a steer which strays upon the track through the opening, and is killed.

Error to Schoolcraft; Steere, J. Submitted June 10, 1897. Decided June 28, 1897.

Case by Andrew McDonald against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company to recover the value of a steer killed on defendant's track. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*Virgil I. Hixson*, for appellant.

*C. W. Dunton* and *E. C. Chapin*, for appellee.

LONG, C. J. Defendant built a spur track off its main line, extending about two miles to what is called "White Marble Lime Company's Works." This spur track was never fenced, though built in 1892. At the point where the spur joined the main track, there was an opening in the fence of about 50 feet. This junction was used continuously in making up trains, though no station house was built there. On July 20, 1894, the plaintiff's steer strayed upon this spur track at the opening, and, going thence upon the track, was killed. On the trial the court below directed the verdict in favor of the defendant.

Under the undisputed evidence in the case, the court was not in error in this instruction. It appears that the

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defendant was carrying on quite an extensive business at this spur. Large quantities of wood, cedar and hemlock ties, lime, and logs had been banked there during the winter of 1893–94, some of them being banked within two or three hundred feet of the place where the spur left the main line. The switch was used every day for switching passenger trains and for like purposes. It was a public, open switch, and constructed for the convenience of the general public. There was no other spur or siding within four miles of that point, and the nearest station was six miles distant. It is apparent, from the undisputed evidence, that it was necessary to keep this switch open and unfenced for the convenience of the public, who were delivering forest products there. The rule in such cases is stated in *Chicago & Grand Trunk R. Co.* v. *Campbell*, 47 Mich. 266:

"The policy of state legislation is against cattle roaming at large, and on a railroad track they are trespassers. The statute, for reasons of general protection, makes a railroad company liable for their destruction where the fencing is neglected, and they wander upon the track in consequence; but there is no statutory neglect when the place is one which the common convenience of the public and the railway company requires should be open for the transaction of their mutual business."

The case is so fully covered and ruled in principle by *Schneekloth* v. *Railway Co.*, 108 Mich. 1, that no further comment need be made.

The judgment below is affirmed.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## POTTER *v.* TOLBERT.

1. PARTNERSHIP—DISSOLUTION.
   A partnership is dissolved when it ceases to do the business for which it was organized. So *held* where a banking firm closed the doors of its bank, and did no business thereafter except to collect its accounts and liquidate its debts.

2. SAME—SETTLEMENT OF AFFAIRS—FIRM NOTES.
   The partner intrusted with a settlement of the partnership affairs after the dissolution of the firm is not authorized to give notes in settlement of partnership debts, unless such right is conferred upon him by the other partners.

Error to Montcalm; Daboll, J., presiding. Submitted June 10, 1897. Decided June 28, 1897.

*Assumpsit* by Thomas J. Potter against James Tolbert and Leroy Moore upon a promissory note. From a judgment for plaintiff, defendant Tolbert brings error. Reversed.

*Humphrey & Grant*, for appellant.

*N. O. Griswold* (*E. J. Bowman*, of counsel), for appellee.

MOORE, J. This suit was commenced the latter part of 1895 to recover a balance claimed to be due upon a note dated January 8, 1887, signed by "Leroy Moore & Co.," upon the back of which was an indorsement of "$500 paid January 9, 1892." Defendant Tolbert filed with his plea a denial under oath of his execution of the note. The case was tried by a jury, who rendered a verdict for the full amount claimed by the plaintiff. Defendant Tolbert appeals, and claims that under the proofs a verdict should have been directed in his favor.

The plaintiff's testimony tends to show that, for some years prior to 1884, defendant Tolbert was a member of

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the firm of Leroy Moore & Co., who were engaged in the banking business at Greenville, Mich.; that the plaintiff was a depositor in the bank, which suspended payment and closed its doors in June, 1884; that the plaintiff was one of a committee of creditors and depositors; that the committee met with Moore and Tolbert at or about the time of the suspension, and were told by Tolbert that he was a full partner in the business; that at this meeting there was a proposition made by the committee to call the creditors together, and recommend that they should take 60 cents on the dollar, and that Mr. Moore and Mr. Tolbert refused, saying that they had always paid 100 cents on the dollar, and that all they wanted was time to liquidate; that, after this time, plaintiff was paid interest on the face of the account up to the date upon which the note was given. The plaintiff further testified that Mr. Moore had the active management of the bank during the time Moore & Co. were in business, and had the active management of liquidating their affairs; that there was due him on this deposit January 8, 1887, the amount stated in the note which he took on that date. He says that he had no knowledge after the suspension of the bank, and prior to the taking of the note, that Moore & Co. had dissolved partnership; that the note was signed and delivered to him by Leroy Moore; that there was paid to plaintiff by Leroy Moore $500, January 9, 1892; and that at that time he had no notice of the dissolution of the firm.

On the cross-examination he testified that he knew the firm Leroy Moore & Co. from the time they started business in Greenville until they suspended payment, and at times was a borrower of them; at the time of the suspension he was a creditor; that they carried on no business in Greenville but the banking business; that plaintiff was a lumberman, and handled a good many thousands of dollars each year through the bank of Leroy Moore & Co.; that their business was carried on at the corner of Cass and Lafayette streets in Greenville; that they closed their doors permanently in June or July, 1884, and that he had

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no recollection of their opening again, or of their doing business, after that. He further testified that this banking firm was succeeded by the City National Bank of Greenville in the summer of 1884, which bank occupied the place of business formerly occupied by Leroy Moore & Co.; that he kept an account and made his collections through the City National Bank, of which Moore was first cashier, and then president; that, after Moore became president, he had active charge of the affairs of the City National Bank, and spent practically all of his time with it, and that the City National Bank continued to do business in the same rooms formerly occupied by Leroy Moore & Co. until 1893, when it suspended.

He further testified that prior to 1884 Leroy Moore & Co. had a sign on their banking place during the entire time they were in business, reading "Leroy Moore & Co.;" that, when the City National Bank occupied the rooms, the sign "City National Bank" was put up, and the sign "Leroy Moore & Co." disappeared; and that the note in suit was the only note he ever had for his deposit. He further testified that it was well known that Leroy Moore & Co., after the suspension, were not doing any business in Greenville except liquidating their old indebtedness, which was attended to by Leroy Moore. He further testified on the direct examination that when the committee met with Moore and Tolbert in June, 1884, it was arranged that Mr. Moore would continue in charge of the business of the firm, collecting the accounts and liquidating the debts; that no time was specified or agreed upon within which this was to be done, but the understanding was that they were to pay the debts in full.

It does not appear from the testimony of the plaintiff that he ever talked with Mr. Tolbert after this meeting in June or July, 1884. Mr. Tolbert denied the material statements contained in the plaintiff's testimony. He denied that after the bank suspended he ever authorized Moore to give notes of the firm for any indebtedness, either old or new, and claimed that he had no knowledge

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of the giving of the note in controversy, or of the payment of $500 made upon it, until shortly before the suit was brought.

The questions involved are:

*First.* Did the suspension of the bank dissolve the partnership?

*Second.* After the dissolution of the partnership, was Leroy Moore authorized to give the note of the firm for the debt of the firm which existed at the time of the suspension?

Giving the testimony of the plaintiff the most favorable construction possible, the evidence is too plain for controversy that the firm of Leroy Moore & Co. ceased to do a banking business in Greenville in June or July, 1884, and that plaintiff knew of it. The law is pretty well settled that a partnership is dissolved when it ceases to do the business for which it was organized. 3 Kent, Comm. 52; Pars. Partn. 384; *Spurck* v. *Leonard*, 9 Ill. App. 174; *Bank of Montreal* v. *Page*, 98 Ill. 109; *Ligare* v. *Peacock*, 109 Ill. 94.

As to the second question: It has long been settled in this State that the partner who is intrusted with the settlement of partnership affairs is not authorized, after the dissolution of the partnership, to give notes in settlement of partnership debts, in the absence of authority conferred upon him by the other partners to do so. The liabilities of the partners might be greatly increased, and their rights greatly impaired, if the partner who is settling the partnership affairs might make partnership paper which is payable a long time in the future, without being authorized to do so. It was assumed in *Farmers & Mechanics' Bank* v. *Kercheval*, 2 Mich. 504, that the law was well settled that no such implied authority existed. In *Smith* v. *Shelden*, 35 Mich. 42, it was said: "We think it much safer to require express authority, when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of

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their concerns, when a settlement is the very purpose for which he is to act at all." *Atwood* v. *Gillett*, 2 Doug. (Mich.) 206; *Pennoyer* v. *David*, 8 Mich. 407; *Matteson* v. *Nathanson*, 38 Mich. 377; *Jenness* v. *Carleton*, 40 Mich. 343; *Carleton* v. *Jenness*, 42 Mich. 110; *Goodspeed* v. *Plow Co.*, 45 Mich. 237; *Johnson* v. *Emerick*, 70 Mich. 215.

The record discloses an entire absence of authority conferred by Mr. Tolbert upon Mr. Moore to sign notes for the firm after the dissolution of the partnership. There is also no proof of authority to make the $500 payment, which had the effect of taking the note out from the running of the statute of limitations. As the case stood when the proofs were closed, the jury should have been instructed to return a verdict for the defendant Tolbert.

Judgment is reversed, and a new trial ordered.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## MUNROE v. MERRELL.

MECHANICS' LIENS—PAYMENTS AT OWNER'S RISK.

An owner who makes payments to a contractor without requiring of him the statement as to the amount due or to become due to material men, which, under section 4 of the lien law (Act No. 179, Pub. Acts 1891), he may lawfully demand, does so at his own risk (Act No. 199, Pub. Acts 1893, § 1); and the fact that he believed at the time that moneys previously advanced by him to material men on the contractor's order had paid such claims in full will not relieve the property from a lien for the balance due, there having been no misrepresentation on the part of the claimants.

Appeal from Wayne; Steere, J., presiding. Submitted June 11, 1897. Decided June 28, 1897.

Bill by William Munroe against Joseph Merrell and another to enforce a mechanic's lien. From a decree for complainant, defendant Merrell appeals. Affirmed.

*Anderson & Rackham*, for complainant.

*James H. Pound*, for appellant.

MONTGOMERY, J. Complainant filed a bill to enforce a mechanic's lien. The record shows that all the statutory steps were taken by complainant to preserve and perfect his lien. Defendant, however, contends that it is inequitable for complainant to be permitted to retain his lien.

The circumstances relied upon by defendant to defeat the lien are as follows: It appears that, before complainant had furnished the material which his contract called for, he obtained an order of the contractor, and presented it to defendant Merrell, the owner, and received pay upon it. Defendant says that he at that time supposed that the order took everything in, not being led to believe

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otherwise, and that he thereafter guaranteed to pay for timber required to complete the building, for the reason that he found it necessary to do so, as the contractor was apparently unable to. It is not claimed that the complainant actively misled the defendant by any false statement. It does appear that the defendant paid moneys which went to the personal benefit of the contractor, and it further appears that he did not require of the contractor the affidavit which he is authorized by statute to call for as a condition to making payments to the contractor. By section 1 of Act No. 199, Pub. Acts 1893, it is provided that "the risk of all payments made to the original contractor after he [the owner] shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement as hereinbefore provided, shall be upon the owner." The "statement hereinbefore provided" for is the statement of the contractor under oath, showing the number and names of subcontractors, etc. Act No. 179, § 4, Pub. Acts 1891. It must be held that the defendant made the payments at his own risk.

The decree sustaining the complainant's lien is affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## WHITE v. WHITTAL.

ASSAULT AND BATTERY—EVIDENCE—APPEAL.

The Supreme Court declined to disturb a judgment for the defendant in an action to recover damages for injuries received in a street fight, the jury having found, upon competent evidence, that plaintiff was the assaulter, or was at least a willing participant in the affray.

Error to Kent; Grove, J. Submitted June 11, 1897. Decided June 28, 1897.

Case by Edward White against Thomas Whittal for assault and battery. From a judgment for defendant, plaintiff brings error. Affirmed.

*C. O. Smedley* (*Benn M. Corwin*, of counsel), for appellant.

*McKnight & McAllister*, for appellee.

GRANT, J. Plaintiff and defendant had a disgraceful fight in the public highway, in the presence of their own children and neighbors, on their way home from a school meeting. The language used was also disgraceful. Each charged the other with commencing the assault, and introduced testimony tending to sustain the charge. There is also testimony tending to show that the fight was mutual, each being "eager for the fray." Plaintiff was worsted in the fight. He entered a criminal prosecution for assault and battery against defendant, who was acquitted upon the trial. He then brought this action for damages, and the jury again found against him, either upon the theory that he was the assaulter or that the fight was voluntary. The court fully explained to the jury the claim of each party and the correct rules of law governing the case. A

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discussion of the points raised would be of no benefit to any one.

We find no error, and the judgment is affirmed.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## ATTORNEY GENERAL *v.* CITY OF DETROIT.

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MUNICIPAL CORPORATIONS—SALARIES—BOARD OF ESTIMATES.

Under Act No. 366, Local Acts 1895, § 4, empowering the board of estimates of Detroit to disallow any items or parts of items of the various estimates referred to it, and making it unlawful for the common council to expend any moneys as to items thus specifically disallowed, the city has no authority to pay an official the salary fixed by the common council after the board of estimates has reduced the amount.

Appeal from Wayne; Lillibridge, J. Submitted June 10, 1897. Decided June 28, 1897.

Bill by Fred A. Maynard, attorney general, to enjoin the city of Detroit from paying to James McQueen and James Barker, as assistant boiler inspectors, larger salaries than the amounts allowed by the board of estimates. From a decree for complainant, defendants appeal. Affirmed.

*John J. Speed*, for complainant.

*C. D. Joslyn*, for defendant city of Detroit.

*Corliss, Andrus & Leete*, for defendants McQueen and Barker.

LONG, C. J. As provided by the charter of the city of Detroit, the controller submitted his annual estimates to

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the common council, and, among other purposes for which estimates were made and included in the general fund, was a sum for the salary of two assistant boiler inspectors at $1,200 each. The common council adopted the estimates, including these salaries, but the board of estimates reduced the amount $600; making the salary as allowed for the first assistant $1,000, and for the second assistant $800. Notwithstanding the action of the board of estimates, the council resolved to pay each inspector a salary of $1,200. This bill was filed to enjoin the city from paying a larger salary than the amount allowed therefor by the board of estimates.

By Act No. 366, Local Acts 1895, § 4, it is provided:

"The said board [of estimates] shall have the power, and it shall be its duty, after careful consideration of the various estimates referred to it, if it shall deem it advisable so to do, to disallow any item, items, or parts of items in the different funds, as well as in the gross amounts thereof, as the said board may deem advisable; and it shall be unlawful for the common council of said city to create any expenditure or expend any moneys as to items specifically disallowed and disapproved by such board of estimates."

In *Robinson* v. *City of Detroit*, 107 Mich. 168, it was said by this court:

"The legislature has seen fit to place this power in the hands of the board of estimates, as a restriction upon the power of the common council, and to declare that it shall be unlawful for the latter to create expenditures or expend any money as to items disallowed and disapproved by the board of estimates."

These officers were created by the common council, and that body has no power, under the charter, to pay the salary of such officers unless there be money for that purpose. Moneys are raised only for the fiscal year and for particular purposes, and must be paid out for the purposes for which they are raised, and no other; and, if any balances, such balances are paid into the sinking fund at the close of the year. The money for these salaries could

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not be raised except by the action of the board of estimates. That board is clothed with power, under the act of 1895, to cut out any item, items, or parts of items. In the exercise of that power, the board cut out a part of these very items. There is therefore no money in that fund to pay beyond $1,000 and $800, respectively, to these inspectors.

The court below very properly held that the city should be enjoined from paying more than these amounts. That decree will be affirmed.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. HOOKER, J., did not sit.

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GRANDORF *v.* DETROIT CITIZENS' STREET RAILWAY CO.

PERSONAL INJURIES—OBSTRUCTED SIDEWALK—ASSUMPTION OF RISK.

One who, in the daytime, attempts to pass over paving stones which she sees scattered across the sidewalk, assumes the risk of injury.

Error to Wayne; Donovan, J. Submitted June 11, 1897. Decided June 28, 1897.

Case by Dorotoe Grandorf against the Detroit Citizens' Street Railway Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*William Stacey*, for appellant.

*Brennan, Donnelly & Van De Mark*, for appellee.

MONTGOMERY, J. This is an action for personal injuries. According to the claims of plaintiff, the defendant

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was engaged in paving between its tracks in the fall of 1895, and for this purpose used stone from 8 to 14 inches long, 4 inches thick, and from 7 to 7½ inches deep. The stone for this purpose were piled along the street, and left there for some little time. Some were piled up loosely inside the curb, and projected over the sidewalk about a foot and a half. It was claimed that the sidewalk was shaky; that, when people walked along it, their weight would loosen some of the stone piled on the walk, and they would fall down on the walk; that the stone were left scattered over the walk in different places; that people along the line of the street were accustomed, notwithstanding the presence of the stone, to habitually pass along the walk; that, at the place of the accident, the sidewalk was only a 4 or 4½ foot walk, and that a foot and a half of that was taken up by the pile of stone; that, on the day in question, plaintiff, in company with two other ladies, had occasion to pass along the north side of Gratiot avenue, between Chene street and Grandy avenue; that the plaintiff, carrying a child in arms, and one of the other ladies, were walking abreast, and, when about the middle of the block, they encountered six or seven loose stones upon the sidewalk; that these stones were lying separate from each other, and extended across the entire walk; that the plaintiff saw these stones, and continued on her way; that she had stepped over one stone, and, when in the act of stepping over another, stubbed her toe, fell, and was severely injured. The injury occurred in the daytime, and the plaintiff saw the stone. The circuit judge charged the jury that the plaintiff was guilty of contributory negligence, and could not recover. Plaintiff brings error.

We think this ruling correct. Plaintiff cites the case of *Laughlin* v. *Railway Co.*, 62 Mich. 220, and other cases, in which it is held that knowledge of an obstruction or defective condition of a street does not make it negligence *per se* for the plaintiff to continue to attempt to pass over such defective way. But none of these cases



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go the length required here, where the nature of the obstruction and the steps necessary to avoid it are both apparent and in the mind of the plaintiff at the very moment of the accident. If this had been a defect of which the plaintiff simply had had previous knowledge, and which knowledge was not in her mind at the time, or if her attention had been diverted from the obstruction, there would be ground for the plaintiff to stand upon. See *Graves* v. *City of Battle Creek*, 95 Mich. 266 (35 Am. St. Rep. 561). But she not only knew of the presence of this stone in the way; she knew how to avoid stubbing her toe against it. For, aside from the fact that the court might well assume that any person would know the effect of stubbing the toe against an obstruction, it appears that this plaintiff knew how to avoid it, from the fact that she had stepped over other stones in similar position, before reaching this. The condition was perfectly apparent to her. There were no latent defects. She knew precisely the risk she assumed, and assumed it. The case falls within *Black* v. *City of Manistee*, 107 Mich. 60.

Judgment affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## HAMMOND v. RATHBONE.

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1. APPEAL—CHANCERY ISSUES.
   The conclusion of the circuit judge, who saw the witnesses, upon a direct issue of fact as to the ownership of a mortgage sought to be foreclosed, is entitled to great weight on appeal.

2. SAME—SETTLEMENT OF CASE—CUMBERSOME RECORD.
   The practice of settling chancery cases by including all of the testimony, immaterial and otherwise, and setting it forth by questions and answers, is condemned.

ON REHEARING.

APPEAL—DISCUSSION OF CONTENTIONS—OMISSION FROM ORIGINAL BRIEF—HOW CURED.
   A contention that the evidence in foreclosure proceedings shows the property to have been occupied by the mortgagor and his wife as a homestead, and therefore to be exempt from sale under a mortgage signed by the husband alone, will not be treated as abandoned because the discussion thereof is inadvertently omitted from defendant's original brief, if it is thereafter urged in a supplemental brief, and the omission explained.

Appeal from Ionia; Davis, J. Submitted June 11, 1897; original opinion, for affirmance, June 28, 1897. Rehearing granted September 23, 1897; final opinion, modifying the earlier decision, June 28, 1898.[1]

Bill by Ambrose Hammond against George W. Rathbone and others to foreclose a mortgage. From a decree for complainant, defendants Rathbone appeal. Modified.

*R. A. Hawley*, for complainant.

*V. H. & H. H. Smith*, for appellants.

[1] A subsequent application by complainant for a rehearing was denied September 27, 1898.

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GRANT, J. The purpose of this bill is the foreclosure of a mortgage for $250, dated April 1, 1889, due two years from date, and executed by defendant George W. Rathbone to defendant Jesse S. Cahoon. Mr. Cahoon was indebted to complainant on a promissory note for $171.50. Complainant alleges that the mortgage and note in question were delivered to him by Cahoon as security for the debt due from Cahoon to complainant. The defendants Rathbone alone appeared and answered. In their answer they aver, upon information and belief, that the indebtedness from Mr. Cahoon to complainant was paid. As to the other material allegations, the answer either admits them, or simply denies knowledge in regard to them, and leaves complainant to his proofs thereon.

The bill alleges that the mortgage was given to secure part of the purchase price for the land. The answer denies this, and claims a homestead in the land; but the Rathbones were not sworn, and introduced no evidence to sustain this averment or denial. This claim is practically abandoned, for in their original brief the counsel for the Rathbones do not mention it. The bill was filed December 22, 1893. When the answer was filed does not appear, and it must be assumed that it was within the time fixed by the rules. Upon the hearing, and after the testimony was introduced, defendants Rathbone were permitted to amend their answer by alleging that Mr. Cahoon did not own the note and mortgage at the time they were delivered to complainant, but that they belonged to Frank W. Clark, and that they were delivered to complainant at Clark's request for an entirely different purpose than the one alleged in the bill. August 20, 1894, two years before this case was heard, the Rathbones conveyed the land to Clark. Clark was the principal witness for the defendants. A direct issue is presented, whether this mortgage belonged to Mr. Cahoon, and was delivered to complainant to secure his indebtedness, or whether it was delivered by Mr. Cahoon at the request of

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Clark for the purpose claimed by him. The question is one of fact. The circuit judge saw the witnesses, and, as we have often held, is in better position to determine such questions than is the appellate court. After a careful examination of the testimony, we see no occasion to reverse his conclusion.

This case was settled by including the entire testimony, by question and answer. Some of the witnesses were recalled eight or ten times. The practice of thus settling chancery cases is to be condemned. The record contains much immaterial testimony, which should have been eliminated, and the case put in narrative form. There is no necessity of putting this court to the labor and time of examining so long a record.

The decree is affirmed, with costs.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

ON REHEARING.

PER CURIAM. This was a suit to foreclose a mortgage, and the main controversy was over the question of complainant's ownership of the mortgage. That question was determined in favor of the complainant upon the first hearing, and need not be further considered. *Hammond* v. *Rathbone*, *ante*, 499.

It appears that the mortgage covers two village lots, and the answer of the defendants alleges that lot No. 103 was the homestead of the mortgagor, and that the mortgage was void as to this lot, for the reason that his wife did not sign it. The evidence shows that the south lot was occupied as a homestead, if both were not, which does not clearly appear. This point was not made in the defendants' first brief, but our attention is called to a supplemental brief, filed before the former hearing, in which the claim of homestead rights was made, and the omission to

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mention it in the first brief explained as an inadvertence; but this escaped our attention before. Lot 103 should therefore be exempted from the decree, which will be modified accordingly.

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SCHULZ *v.* SCHULZ.

1. TRIAL — ACTION ON NOTE — EVIDENCE — COMPROMISED CLAIM — INSTRUCTIONS.

   Defendant was charged by the administrator of his mother's estate with a loan of $500. In a conference at the probate office, defendant admitted having received $350, and produced notes for the amount, signed by himself, which he claimed had been returned to him by the deceased upon her receiving payment. The probate judge pronounced the notes forgeries, and a new note for $350 was finally given by defendant and accepted by the administrator. *Held*, that evidence of these facts in an action upon the note warranted an instruction as to the law governing compromises of disputed claims.

2. SAME.

   In any event, the instruction as to compromises could not have been prejudicial to defendant, where the jury were also charged that if it should be found that he gave notes to deceased for the $350 which he borrowed of her, and that he paid these notes, he would not be liable in the case.

3. SAME—REPEATING INSTRUCTIONS—REMARKS OF COURT.

   After giving the instruction last referred to, the court read a request of the defendant which covered the precise point in different language, and said: "I think I will decline it. It is good law, but I do not think it necessary for that language." *Held*, equivalent to saying that he did not deem it necessary to repeat an instruction already given.

4. SAME—MODIFICATION OF REQUEST.

   An instruction that the fact that defendant, at a specified time four years before the trial, took $208 from his house, and soon after returned without the money and with a $200 note, was evidence of its payment, was properly modified by stating

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that this would be true if in fact the jury should "believe that he did so," there being evidence that the $200 note produced by defendant as the same note was freshly written.

5. SAME—EVIDENCE—DECLARATION OF PURPOSE—RES GESTÆ.
Evidence that defendant, on leaving the house with the money, stated that he was going to pay his mother, was not admissible as part of the *res gestæ*.

6. SAME—MOTIVES.
Evidence that defendant, who claimed to have destroyed the notes produced at the conference because he was told by the probate judge that he might be "put through" for retracing them, destroyed other notes at the same time, was admissible, as bearing on the probability of the reason assigned by him.

7. SAME — WITNESSES — UNDISPUTED TESTIMONY — WHAT CONSTITUTES.
It is only in a case where the testimony of a witness is not only unopposed by direct evidence, but where it is not in conflict with the just and proper inferences to be drawn from other facts proved in the case, that it is proper for the court, in giving his instructions, to treat the evidence as wholly undisputed.

Error to Saginaw; Kendrick, J. Submitted June 11, 1897. Decided June 28, 1897.

*Assumpsit* by Julius Schulz, administrator of the estate of Maria E. D. Schulz, deceased, against William Schulz, upon a promissory note. From a judgment for plaintiff, defendant brings error. Affirmed.

*James H. Davitt* and *H. E. Naegely*, for appellant.

*Fred H. Allen* (*E. L. Beach*, of counsel), for appellee.

MONTGOMERY, J. This is an action upon a promissory note for $350 made by defendant to plaintiff as administrator. The execution of the note was not denied. The defenses were failure of consideration and duress.

It appears from the testimony that defendant in April, 1890, had borrowed money of deceased, who was his mother, and that at the time of the execution of this note,

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August 17, 1895, a conference was held at the office of Judge Brucker, who was at the time probate judge of the county, relative to the claim of the estate against defendant. There were present at this conference Judge Brucker, the defendant, the plaintiff, and Rudolph Schulz, another brother. Defendant's testimony tended to show that upon borrowing the money of his mother in 1890 he had given two notes, of $150 and $200, respectively, and his theory was that the notes had been paid to his mother in her lifetime, and were in his possession at the date of the conversation in question. Two notes signed by defendant, and purporting to be the notes executed to his mother, were produced at this interview. The testimony on the part of the plaintiff tends to show that these notes had been recently written, that the ink was fresh, and that they could not have been in existence since 1890. Defendant testified that the notes that he had given had become obscure, and that he retraced the writing on the notes before they were presented at this interview; that in the conversation Judge Brucker told defendant that, if he could not adjust the matter with his brothers, it meant a lawsuit; and that Judge Brucker, in effect, pronounced the notes forgeries. Defendant says that, when Judge Brucker charged that the notes were recently written, "it struck me right away, because I had retraced them," and further testifies that Judge Brucker then said, "Did you know your brothers could put you through for that?" This last statement is disputed by the plaintiff's witnesses. It was also in evidence that the brothers of defendant claimed at the interview that defendant had had other moneys of the deceased. The assignments of error relate to the charge and refusals to charge, and to rulings upon evidence.

The circuit judge charged the jury that the law favors compromises, and that if a *bona fide* claim with a color of right is made by one party, honestly and in good faith believing it to be a valid claim, and the other party, disputing the amount of the claim, agrees upon a settlement,

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such settlement is binding. It is complained of this instruction that there is no evidence tending to show that this transaction amounted to a compromise of a disputed claim. While we think the question not very material, in view of other instructions in the case, we think there was some evidence to show, not only that plaintiff claimed that defendant had received more than the $350, but that defendant admitted that he had received more than that amount from his mother. It is true that, by the great weight of the testimony, the matter in controversy would appear to have been only this $350; but the record is not destitute of testimony of other and further claims. Judge Brucker testified that the administrator made a claim that William had borrowed at different times something like $500 or $600, and had not paid it back; that he owed it to the estate. It is said that there is no evidence that this $350 was received as a settlement of anything other than the amount borrowed in 1890. But we think, in view of the claim that was made, and the giving of this note, it was at least a question for the jury as to whether it was not received in settlement of all the claims put forth by the plaintiff in these negotiations. Indeed, we think the inference almost irresistible that such was the intention of the parties. But a further answer to the complaint of defendant in this respect is that the circuit judge charged the jury that if it should be found that the defendant gave notes to his mother for the $350 which he borrowed of her, and that he paid these notes, defendant would not be liable in this case. It is difficult to conceive how the jury could have been misled by any instruction on the subject of a compromise.

After giving the instruction last above referred to, the court read a request of the defendant which covered the same point precisely, in different language, and said: "I think I will decline it. It is good law, but I do not think it necessary for that language." This is complained of. We do not think this could have worked any injury to the defendant, as it was no more than saying that the court

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did not deem it necessary to repeat an instruction already given.

Defendant and his wife testified that on or about the 5th of April, 1891, defendant's wife let him have $208, which he took from the house, and returned with the note of $200. Defendant testified that when he returned home he did not have the $208 in his possession, but only $2, and that he had the $200 note above referred to, and that he got the $200 note while he was away from home that day. Defendant preferred a request as follows: "The fact that on the 5th of April, 1891, defendant took $208 from his house, and returned, after being absent some hours, without the money and with the $200 note, is evidence of its payment." The court gave this instruction, adding: "That is true. If in fact you believe that he did so, it would certainly be evidence for you to consider as to the correctness of that fact." It is contended that this modification, "if in fact you believe that he did so," was strongly calling in question the undisputed testimony of the witnesses. But the testimony was not undisputed. It is in conflict with the theory of the plaintiff and with the testimony of plaintiff's witnesses, which tended to show that the note which was produced at the conference in 1895 was freshly written, and which defendant testified was the same note which he had brought home April 5, 1891. The modification of this instruction was not only proper, but necessary. The request preferred by defendant assumed the statement embodied in it to be a fact established. It would have been error to give the instruction in the form presented.

Two requests were presented in which the judge was asked to state to the jury that certain facts testified to by defendant's wife were undisputed, and that this testimony should be accepted by the jury as true. It is only in a case where the testimony of a witness is not only unopposed by direct evidence, but where it is not in conflict with the just and proper inferences to be drawn from other facts proved in the case, that it is proper for the

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court to treat the evidence as wholly undisputed. As before pointed out, the testimony of Mrs. William Schulz, in material respects, was in conflict with other testimony in the case; and whether, upon these specific questions, she was directly contradicted by any witnesses, is not material, for, if she were shown to have testified falsely upon any material fact in the case, this would so far affect her credibility that the jury would not be bound to accept her unsupported statements. There was no error in refusing these requests.

It appeared in the testimony of defendant that the two notes produced by him in the interview were destroyed. On cross-examination he was asked if he destroyed any other notes at the time these were destroyed. Error is assigned on the ruling admitting this testimony. We think it was proper cross-examination. Defendant had testified that he destroyed the two notes for the reason that Judge Brucker had said to him, "Do you know your brothers could put you through for that?" referring to the retracing of the notes, as he claims. We think it was competent to show that other notes, which he had no reason to suppose could be used as evidence against him, were destroyed at the same time, as bearing upon the probability of the reason he had assigned for destroying those in question being the true one.

The wife of defendant was asked to state what defendant said at the time he took the money (the $208) and left the house. The evident purpose was to show a declaration that he was going to pay the money to his mother. It is contended that it is part of the *res gestæ*. But it was no more than the declaration of a purpose. It did not characterize an act shown to have been performed, but was an assertion of a purpose to perform an act. *Res gestæ* are circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate it. We think the testimony was not admissible. See *Pinney* v. *Jones*, 64 Conn. 545 (42

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Am. St. Rep. 209); *Home Ins. Co.* v. *Marple*, 1 Ind. App. 411; *Tolbert* v. *Burke*, 89 Mich. 132.

We think no error was committed to the prejudice of defendant, and the judgment will be affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## HEAVENRICH *v.* NICHOLS' ESTATE.

1. ESTATES OF DECEDENTS — CLAIMS — REVIVAL OF COMMISSION — NOTICE.

   The revival of the commission for the examination of claims against a decedent's estate, under 2 How. Stat. § 5894, at any time before the estate is closed, upon the payment of costs by the creditor making the application, is a matter not of discretion, but of right, and hence the probate court may enter the order without giving notice of the application to the administrator, heirs, or creditors.

2. SAME—ADMINISTRATORS—ESTOPPEL.

   An administrator who appears before the commissioners at the hearing upon a claim for the examination of which the commission has been revived is not in a position, upon the creditor's appeal from an order of disallowance, to raise the objection that no notice of the hearing was served upon him, or upon the heirs or other creditors of the estate.

3. SAME—DELAYED MEETING.

   The fact that the meeting of the commissioners was delayed, without the fault of the creditor, two days beyond the time provided in the order reviving the commission, will not defeat the claim.

Error to Shiawassee; Smith, J. Submitted June 11, 1897. Decided June 28, 1897.

Samuel Heavenrich and another, copartners, presented a claim against the estate of Amos W. Nichols, deceased.

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The claim was disallowed by the commissioners, and claimants appealed to the circuit court. From a judgment for claimants on verdict directed by the court, the administrator brings error. Affirmed.

Mr. Nichols died January 11, 1890, intestate. An administrator was duly appointed. March 3, 1890, commissioners were appointed to hear claims. September 9, 1890, the commissioners filed their report. August 29, 1895, claimants presented a petition to the judge of probate asking for a revival of the commission. September 4, 1895, the probate court made an order reviving the commission to hear plaintiffs' claim; granting two months for the commission to receive, examine, and adjust the claim. The claim was duly filed within the time. The commissioners met November 6th and disallowed the claim. In their report the commissioners stated that they had notified all parties interested of the time and place fixed by them for hearing the claim. From this decision plaintiffs appealed to the circuit court, and upon the trial the court directed a verdict for them for $1,207.78.

*Selden S. Miner*, for appellant.

*John T. McCurdy* and *Sloman & Groesbeck*, for appellees.

GRANT, J. (*after stating the facts*). 1. It is contended that the probate court obtained no jurisdiction to make the order reviving the commission, because no notice was served upon the administrator, heirs, or creditors. The revival of the commission at any time before the estate is closed is a matter of right, and not of discretion. Therefore no notice was necessary. 2 How. Stat. § 5894; *Hart* v. *Shiawassee Circuit Judge*, 56 Mich. 592.

2. It is also urged as a fatal objection that no notice was served upon the heirs or creditors of the estate. The record does not show upon whom the commissioners

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served notice of the hearing before them. The circuit judge, in instructing the jury, stated that the administrator appeared before the commissioners, and "simply filed an objection to the jurisdiction in a general way." It is fair to presume that notice was served upon the administrator by the commissioners. He was a witness, and did not deny service. Whether or not this be so, he appeared, and was not, therefore, prejudiced by want of notice. He made no motion to dismiss the appeal for want of jurisdiction, but proceeded with the trial upon the merits. If the administrator represented the heirs and creditors in this proceeding, notice to him is notice to them. If he does not represent them, then it is sufficient to say that they are not here raising any objection. We think the administrator is estopped to now raise this question under the following decisions: *Jenks* v. *St. Clair Probate Judge*, 96 Mich. 122; *Bacon* v. *Kent Probate Judge*, 100 Mich. 183.

3. The fact that the commissioners met two days after the two months provided in the order did not operate to defeat the claim. Claimants were in no wise responsible for this action, and claims against an estate cannot be defeated by the failure of the commissioners to take final action and to make their report within the time fixed by the order.

The judgment is affirmed.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## SMITH v. JACKSON.

EVIDENCE—CROSS-EXAMINATION—MEMORANDUM OF ACCOUNT.

A defendant cannot complain because a memorandum of account, used by him to refresh his memory upon a defense of set-off and recoupment, was received in evidence after he had been cross-examined upon it.

Error to Grand Traverse; Corbett, J. Submitted June 15, 1897. Decided June 28, 1897.

*Assumpsit* by Andrew Smith against John A. Jackson to recover a balance due upon a fishing contract. From a judgment for plaintiff, defendant brings error. Affirmed.

*Tweddle & Cross*, for appellant.

*George W. Curtis*, for appellee.

HOOKER, J. The plaintiff recovered a judgment of $95 on appeal from justice's court, and the defendant has brought it here for review upon the proceedings had before the circuit court, where the case was tried without a jury. A bill of exceptions was settled, and questions are raised upon the introduction and exclusion of testimony and upon the findings. The action was brought to recover upon a contract by which the plaintiff engaged in fishing in Grand Traverse Bay with nets furnished, respectively, by the defendant and himself. The fish were sent to the defendant, and payments were made thereon, and goods were furnished by the defendant to the plaintiff. The defense consisted of set-off and recoupment.

The defendant testified in relation to his account, refreshing his memory by a "small memorandum," upon which he was cross-examined. At the conclusion of this cross-examination, the plaintiff's counsel was allowed to

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introduce this paper. It is contended that this paper was not the best evidence of the account, and that the books should have been introduced. This question hardly merits discussion, as the defendant produced and used the paper for his own purposes. The right to cross-examination included a right to see it and have the jury see it. Other questions relating to the introduction of evidence are unimportant. We find none showing error.

The bill shows that exceptions were taken to the findings of fact, though it fails to show when they were taken, or that there were specific exceptions to the several findings. Counsel have argued in their brief that the undisputed evidence shows several of these findings to be unsupported by testimony. We have examined all of these questions that are discussed, and are of the opinion that there was evidence supporting each finding; and, under well-established rules, we cannot review the judge's conclusion.

It is said that the court erred in not allowing the defendant the value of the hammer belonging to a pile driver, worth five or six dollars, which was not returned. The court found that it was lost during a storm, without the plaintiff's fault. If, as the defendant's counsel contend, this was furnished under the contract, the court did not err in his conclusion.

The judgment is affirmed.

The other Justices concurred.

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## BUSH v. ST. JOSEPH & BENTON HARBOR STREET RAILWAY CO.

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1. STREET RAILWAYS — COLLISION — NEGLIGENCE — QUESTION FOR JURY.

   The question of the negligence of a street-railway company was for the jury, in an action for personal injuries resulting from a collision, where there was evidence that the plaintiff, who was driving upon the track, was seen by the motorman of defendant's car for a sufficient distance to have enabled him to avoid the accident had he been more prompt in reversing the car, although it appeared that plaintiff had ample time to leave the track upon hearing the gong, but was prevented by the slipping of the wheels of his heavily-loaded wagon against the rails.

2. SAME—CONTRIBUTORY NEGLIGENCE—CHOICE OF HAZARDS.

   Plaintiff's failure to jump from his wagon before the collision occurred did not constitute contributory negligence as a matter of law, it appearing that, by reason of his efforts, he came within a few inches of driving clear of the car; particularly as he was not bound to exercise the best judgment under the circumstances.

3. PERSONAL INJURIES—PLEADINGS AND PROOFS.

   Under a declaration against a street-railway company for personal injuries, alleging negligence on the part of the company in running its car against the plaintiff's wagon, evidence of the following facts and circumstances was held admissible: That plaintiff was on the track; the rate of speed of the car; that the wagon-box fell on plaintiff, and that he subsequently spit blood; the general condition of the track, and that one track was higher than the other.

4. SAME—EXPERT TESTIMONY—FORM OF QUESTION.

   In an action for personal injuries, physicians, called as experts, were asked if certain conditions described by them might be caused by the injury shown. It was objected that the form of the question should be whether they would "probably" be caused thereby. *Held*, that the degree of probability was a proper subject for cross-examination, and did not need to be indicated by the question.



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Error to Berrien; Coolidge, J. Submitted June 16, 1897. Decided June 28, 1897.

Case by George Newton Bush against the St. Joseph & Benton Harbor Street-Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

*A. P. Cady* and *M. L. Howell*, for appellant.

*Gore & Harvey*, for appellee.

HOOKER, J. The plaintiff was injured in a collision caused by a street car striking the rear end of his wagon as he was driving off from the track. The court left two questions to the jury besides that of the amount of damages, viz.: (1) Whether the defendant was negligent in not reducing the speed of the car after discovering the plaintiff upon the track; (2) contributory negligence. The jury found specially that the car was reversed before it struck the wagon, and that the motorman was negligent in not reversing sooner; that the car slid on the track for a very short distance before it struck the wagon; that the car was not checked before it was reversed.

The plaintiff was driving upon the track, and, hearing the bell ring, attempted to drive off, but, owing to the slipping of the wheels upon the iron rails, and the heaviness of the load, the horse did not get the wagon off in time, and the car struck the wagon, and injured the plaintiff. There seems to be no doubt that the plaintiff was seen by the motorman for a sufficient distance to have enabled him to stop the car had he attempted to do so at once, and, on the other hand, there was abundance of time for the plaintiff to have driven off from the track before the car reached him had the horse been able to pull the wagon off at once. We have in several cases had occasion to allude to the fact that the uses to which the highway is put render it necessary that wagons shall cross and perhaps sometimes drive upon the street-car tracks,

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and it is obvious that the car that should be brought to a halt every time that a wagon was seen to be upon or in close proximity to a track would be a long time reaching its destination, and that street railroading upon any such plan would be a farce, and rapid transit impossible. On the other hand, a driver who should never drive across a track before an approaching car might wait a long time for an opportunity. From the very nature of things, the driver must determine when it is safe to cross, and the motorman may run his car towards a wagon upon the track in the expectation that it will be driven out of the way with reasonable expedition. Each, however, must use reasonable caution in view of the circumstances, and, if this is done, no blame attaches. Whether they do this in a given case must usually be a question for the jury, and this case is not an exception.

It is said that the undisputed evidence shows that the plaintiff was guilty of contributory negligence, inasmuch as he might have jumped from the wagon, as others did, when it became plain that a collision must occur. There is evidence that, if the horse had moved the wagon a few inches farther, there would have been no collision, and it is not clear that the plaintiff was not justified in continuing his efforts to get out of the way until it was too late to get off with safety. His companions, having no responsibility, had nothing to delay their escape, while it was his duty to avoid the collision if he reasonably could. Moreover, this claim overlooks the fact that, in an emergency, the best judgment cannot always be exercised.

A series of objections to evidence, and a number of requests to charge, raise questions upon the sufficiency of the declaration, which is said not to be sufficiently specific in its description of negligence. Counsel seem to insist that the law requires that the declaration shall state at length and in detail the circumstances which led up to the accident, and the objection is made that the declaration does not show the specific act of negligence without which the collision would not have occurred. Among these objec-

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tions were the following, viz.: Objection to evidence that the plaintiff was upon the track; the rate of speed of the car; the fact that the wagon-box fell upon the plaintiff, and that he subsequently spit blood; the fact that one track was higher than the other, and its general condition. All of these things were circumstances which throw light upon the question of defendant's alleged negligence, viz., that the motorman carelessly ran the car against the plaintiff's wagon, and its consequences. The only negligence alleged or submitted to the jury was the management of the car, whereby it was permitted to run with great speed and force against the wagon. We discover no defect in the declaration that can be taken advantage of upon the trial, and think the evidence admissible.

Error is alleged upon the form of the questions to the physicians, who were asked if certain conditions described by them might be caused by the injury shown. It is said that they should have been asked if they would probably be caused thereby. We think that when it is shown that an injury is immediately followed by certain physical conditions, and that such conditions might result from such an injury, there is some evidence, though it be slight, for the jury. The degree of probability is a proper subject for cross-examination. The judge did not err in refusing to strike out the physicians' testimony, or in his charge in relation thereto.

We think it unnecessary to further notice specifically the various assignments. We find no error in the record, and the judgment is affirmed.

The other Justices concurred.

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## PENROSE *v.* FEHR.

PERSONAL INJURIES—UNGUARDED EXCAVATION—RUNNING ON SIDEWALK—CONTRIBUTORY NEGLIGENCE.

Running upon the sidewalk, in order to avoid being struck by a snowball, is not *per se* such an act of negligence as will bar a recovery for injuries received from falling into an unguarded excavation.

Error to Gogebic; Haire, J. Submitted June 16, 1897. Decided June 28, 1897.

Case by Wesley Penrose, an infant, by William Penrose, his next friend, against Fred Fehr, for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff, who was 17 years of age, about 8 o'clock on the evening of December 6, 1894, stood at the intersection of two streets in the city of Ironwood. Several boys were throwing snowballs. Plaintiff, with others, ran along the sidewalk, to escape the snowballs, and fell into an excavation, which had been made by the defendant. This excavation was 8 feet wide, 12 feet long, and 3 feet 8 inches deep. It was made for the purpose of drawing dirt from an adjoining lot. There were electric lights at each end of the block, and one near the center. Plaintiff testified that he saw the excavation as he approached it, but not in time to stop. Other witnesses also testified that it was so light that they could see it. Plaintiff testified that, if he had been walking, he thought he would have seen it in time to stop. Plaintiff recovered verdict and judgment.

*C. E. Miller*, for appellant.

*Julius J. Patek* (*Charles A. Withey*, of counsel), for appellee.

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GRANT, J. (*after stating the facts*). The negligence of the defendant, through his employés, in not guarding the excavation, is admitted. The defendant requested the court to instruct the jury that the plaintiff was guilty of contributory negligence, and could not recover. The question of his contributory negligence was left to the jury, under the usual and proper instructions. The theory of the defendant is that walking is the ordinary method of traveling upon sidewalks, and that, where one falls in consequence of running, the municipality is not liable. The act of running in this case was not *per se* negligence. One has a right to run upon the streets and sidewalks in order to escape from the assaults of others, and for many other reasons, and in such cases the question of contributory negligence is for the jury.

The judgment is affirmed.

The other Justices concurred.

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## HEIGHES *v.* DOLLARVILLE LUMBER CO.

LESSOR AND LESSEE—CONVERSION OF HOUSE.

A lessee of land who is in full possession thereof, and of a house built thereon by him under an agreement that it should remain his personal property, cannot maintain an action against the lessor for the conversion of the house because of the sale of the lots to a third party without reservation, although the purchaser requires of him an additional rent.

Error to Luce; Steere, J. Submitted June 16, 1897. Decided June 28, 1897.

Trover by William Heighes against the Dollarville Lumber Company. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

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*F. H. Peters*, for appellant.

*S. N. Dutcher*, for appellee.

HOOKER, J. The plaintiff's brief asserts that he rented two lots from the defendant, with the privilege of building a house thereon, which was to be and remain his personal property; that the lease was oral, and the rent reserved, a dollar a year, which he paid so long as defendant owned the premises. Some two or three years later the defendant sold all of its property at Dollarville, including these lots, to the Danaher-Melendy Company, which continued the business previously conducted by the defendant, the plaintiff continuing in the employ of the new, as he had in that of the old, company. The Danaher-Melendy Company did not evict the plaintiff, who remains in the occupancy of his house, so far as the record advises us; but four dollars per month have been deducted from his pay for rent since said purchase.

This action is brought for the alleged conversion of the house. The circuit judge directed a verdict for the defendant, upon the ground that the plaintiff is, and has been since the house was built, in the full possession of the house and lots, which is conclusive that it has not been converted. If the house was his, the Danaher-Melendy Company got no title, and the plaintiff has a right to remove it at his pleasure, during the continuance of his lawful occupancy of the lots.

The judgment is affirmed.

The other Justices concurred.

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## PARKS *v.* KERSTETTER.

DISTRAINED ANIMALS—NOTICE—WAIVER.

The owner of animals distrained *damage feasant* waives the written notice required by the statute, by trying to get the animals, after learning all the facts, before the expiration of the time for giving such notice, and while the person distraining them is proceeding to take steps under the statute. *Norton* v. *Rockey*, 46 Mich. 460, followed.

Error to Berrien; Coolidge, J. Submitted June 17, 1897. Decided June 28, 1897.

Replevin by Sylvester Parks against Wellington R. Kerstetter. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

*Hammond & Hammond*, for appellant.

*James O'Hara*, for appellee.

GRANT, J. The plaintiff replevied from the defendant seven horses which were distrained *damage feasant*. The defendant found the horses in his wheat field between 7 and 8 o'clock in the morning. On the same day, about 10 o'clock, he notified the plaintiff that he had taken the horses in the wheat field, and informed him that he could have them by paying the damage which they had done, and also paying for their feed. Plaintiff said nothing, and turned away. About noon of the same day, plaintiff went within 20 rods of the defendant's barnyard, where the horses were, and sent one William Ray to try to get them. Defendant told Ray that plaintiff could have his horses by paying $3, which included the damage they had done, and also the cost of once feeding them. Ray at once informed plaintiff of this offer. He declined to pay this small amount, and at once brought replevin. The court directed

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a verdict for the plaintiff on the ground that the statute required a written notice of the impounding to be served upon the plaintiff.

The court was in error. The case is ruled by *Norton* v. *Rockey*, 46 Mich. 460. *Jones* v. *Dashner*, 89 Mich. 246, does not overrule *Norton* v. *Rockey*, but distinguishes the two cases. Defendant had given notice to the town clerk, and was proceeding to take steps under the statute. Before the time had expired for giving such notice, the plaintiff was put in possession of all the facts, and, under the rule of *Norton* v. *Rockey*, waived the notice.

The judgment is reversed, and new trial ordered.

The other Justices concurred.

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## UNION BANKING CO. *v.* MARTIN'S ESTATE.

1. BILLS AND NOTES—EXECUTION AND DELIVERY—PROOF OF.
   The execution and delivery of a note is sufficiently shown to permit of its being received in evidence where the payee produces the same in court, and calls a witness who testifies that he has frequently seen the alleged maker write her name, and that, in his opinion, the signature to the note is genuine.

2. SAME—CONSIDERATION.
   A note given to procure an extension of time for another upon his individual obligation is supported by a sufficient consideration.

3. SAME—MATERIAL ALTERATION.
   The signing of such a note by the debtor, for whose benefit the instrument was given, after it comes into the possession of the payee, is not a material alteration.

Error to Berrien; Coolidge, J. Submitted June 17, 1897. Decided June 28, 1897.

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The Union Banking Company of St. Joseph presented a claim against the estate of Jane E. Martin, deceased, upon a promissory note. The claim was allowed by the commissioners, and the estate appealed to the circuit court. From a judgment for claimant, defendant brings error. Affirmed.

*James O'Hara*, for appellant.

*Lawrence C. Fyfe* and *N. A. Hamilton*, for appellee.

LONG, C. J. Claimant presented a note of $2,500, dated January 10, 1894, signed by the deceased and one Warren Ballengee, to the commissioners on claims for allowance. It was allowed, and on appeal to the circuit court the jury found in favor of the claim, and judgment was entered in favor of claimant.

It appears that, prior to the giving of the note in suit, Ballengee was indebted to the bank on three notes,—one of $300, one of $700, and the other of $1,500. These notes were secured by chattel mortgage. The note in suit was taken, and the Ballengee notes were given up by the claimant and canceled. On the day this note was brought to the bank it was signed only by the deceased. Just who brought the note to the bank is not made apparent, but, after it was brought in, Mr. Ballengee came in and signed it, and took up his three notes and mortgage.

1. It is contended by defendant here that the court erred in receiving the note in evidence, as there was no proof of its execution or delivery. In this counsel is in error. The claimant called Mr. Kelley as a witness, who testified that he had frequently seen Mrs. Martin write her signature, and that he should say it was her signature to the note. There was also the evidence of the note in possession of the claimant, and its being signed by Mr. Ballengee after it came into its possession. Certainly no other proof was necessary to its being introduced in evidence by the claimant, as it was made payable to it.

2. The consideration for the note was the extension of time of payment to Mr. Ballengee.

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3. It is claimed that there was a material alteration in the note after Mrs. Martin signed it. This alteration is said to be the signature of Mr. Ballengee thereon. The testimony shows that Mr. Ballengee was the son-in-law of the deceased, and the note was evidently given to procure an extension of time for him to pay his debt at the bank, and relieve his property from the incumbrance of the chattel mortgage. In signing the note after it had passed to the payee, Mr. Ballengee became a maker, and there was no material alteration in it. *Miller* v. *Finley*, 26 Mich. 249 (12 Am. Rep. 306); *Gano* v. *Heath*, 36 Mich. 441.

The judgment is affirmed.

The other Justices concurred.

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## PEOPLE v. HARRINGTON.

CRIMINAL LAW—INTOXICATING LIQUORS—APPEAL.

A conviction of violating the liquor law, based upon competent evidence and following proper instructions, was affirmed.

Exceptions before judgment from Genesee; Wisner, J. Submitted June 17, 1897. Decided June 28, 1897.

Albert Harrington was convicted of violating the liquor law. Conviction affirmed.

*Clarence Tinker*, for appellant.

*Fred W. Brennan*, Prosecuting Attorney, for the people.

GRANT, J. Respondent was convicted of keeping a saloon and selling intoxicating liquors without having paid the tax or given a bond as required by law. The testimony is all in the record, and fully justifies the ver-

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dict. The attorney for the respondent says in his brief: "I have cited no authorities, and it is not necessary. The questions are almost entirely those of elementary law." The attorney for the people concurs in this view. There is therefore nothing in the case requiring discussion. The learned circuit judge correctly instructed the jury on these elementary principles, and fully as favorably to the respondent as he was justified in doing.

The conviction is affirmed, and the circuit court directed to proceed to sentence.

The other Justices concurred.

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## CARVER *v.* SCHOOL DISTRICT NO. 6 OF BATTLE CREEK TOWNSHIP.

1. SCHOOLS — COMPETENCY OF TEACHER — BY WHOM DETERMINED.
   A district school board has no authority to discharge as incompetent a teacher employed by it under 2 How. Stat. § 5065; the determination of the question of competency being for the board of examiners, which issues the certificate of qualification, and which possesses the power, under 2 How. Stat. § 5155, to annul the same in case of mistake.

2. SAME — GRADE REGISTER — BREACH OF CONTRACT.
   A teacher who complies with the conditions of his contract with the local board in relation to the listing of pupils does not subject himself to lawful dismissal by failing to keep the "grade register" prescribed by the superintendent of public instruction.

3. SAME — WRONGFUL DISCHARGE — DAMAGES — BURDEN OF PROOF.
   A school district has the burden of showing, in an action by a teacher wrongfully discharged, that plaintiff might have obtained other employment in the same line, and thereby reduced his damages. *Smith* v. *School District*, 69 Mich. 589, *Farrell* v. *School District*, 98 Mich. 43, followed.

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Error to Calhoun; Smith, J. Submitted June 17, 1897. Decided June 28, 1897.

*Assumpsit* by Gerald Carver against school district No. 6 of Battle Creek township, upon a teacher's contract. From a judgment for defendant, plaintiff brings error. Reversed.

*Frank W. Clapp*, for appellant.

*Leslie E. Clawson* (*Herbert E. Winsor*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff, on the 11th of September, 1893, entered into a contract with defendant, reading as follows:

"It is hereby contracted and agreed between the district board of school district No. 6, in the township of Battle Creek, county of Calhoun, and State of Michigan, and Gerald Carver, a legally-qualified teacher, in said township, that the said Gerald Carver shall teach the school of said district for the term of nine months commencing on the 11th day of September, 1893; and the said Gerald Carver agrees faithfully to keep a correct list of the pupils, and the age of each, attending school, and the number of days each pupil is present, and to furnish the director of the district with a correct copy of the same at the close of school, and to observe and enforce the rules and regulations established by the district board.

"The said district board, in behalf of said district, agrees to keep the school-house in good repair; to provide the necessary fuel; to keep the school-house in comfortable condition; to pay said Gerald Carver for the said services as teacher, to be faithfully and truly rendered and performed, the sum of $250 per year, the same being the amount of wages above agreed upon, to be paid on or before the 20th day of June, 1894: *Provided*, that in case said Gerald Carver shall be dismissed from school by the district board for gross immorality or the violation of this contract, or shall permit his certificate of qualification to expire, or shall have said certificate annulled or suspended by the county board of school examiners or other lawful authority, he shall not be entitled to any compensation from and after such annulment, suspension, or dismissal."

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Plaintiff at the time held a third-grade certificate, entitling him to teach in the schools of Calhoun county for one year from September 1, 1893. He began teaching on September 11th, and continued until March 9, 1894, at which time the usual spring vacation occurred. During the vacation the district board discharged him, and when he attempted to resume his labors he found the school-house locked against him. Plaintiff spoke to the county commissioner, and asked him if he could find him a position. He obtained none, and remained at home on the farm, and, at the end of the term for which he was employed, brought this action to recover pay for the spring term. The case was tried before a jury at the circuit, and verdict returned in favor of defendant. Plaintiff brings error.

A large number of assignments of error are found in the record, but counsel has grouped them under a few heads, and really the questions involved depend upon a construction of the contract, and the rights of the respective parties thereunder, when read in the light of the school law. The learned circuit judge expressed himself in doubt as to the true interpretation of the statute, but, being required to decide the important questions involved without opportunity to investigate, gave an interpretation favorable to the contention of defendant. The claim made by defendant was that the plaintiff was incompetent; that he lacked in government, and was particularly deficient in his knowledge of grammar and language; that he mispronounced certain words; that he failed on some occasions to have the school-house sufficiently warmed; that he did not get to the school-house early enough in the morning; and that he failed to keep a correct list of the grades of his pupils.

Unquestionably, the failure of the plaintiff to observe the engagements of his contract would justify the school board in rescinding the contract. These engagements were: *First*, to teach the school for nine months; *second*, to keep a correct list of the pupils, and of their ages and

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attendance; and, *third*, to observe and enforce the rules and regulations established by the district board. The contract provided, in effect, that the plaintiff might be dismissed by the district board for gross immorality or the violation of the contract, in which case his compensation should cease, as also in case his certificate expired, or was annulled by the county board of school examiners or other lawful authority. There was no charge of immorality brought against plaintiff, and no rules for the government of the school were adopted by the school board. The case was narrowed down to the questions of whether he kept correct lists, whether he broke his contract by failure to keep fires, and whether the board had the right to discharge him for incompetency. Indeed, the last question is of supreme importance, as the record indicates that the action of the board was taken on this ground. The circuit judge charged:

"The plaintiff must satisfy you by a fair preponderance of the evidence—that is, a fair weight of the evidence—that he was competent to teach this school, to govern and control it, and to impart his knowledge to the pupils, and that he has been reasonably faithful and diligent in the performance of his duties under the contract with the district. * * * I instruct you further that the fact that plaintiff held a certificate from the county board of school examiners, authorizing him to teach school, would not prevent the school district from legally discharging him, if you believe from the evidence in the case he was incompetent, or unfit to have the management of this school. And I instruct you that the district had the legal right to discharge the plaintiff for incompetency or neglect of duty, even though the county board may not have seen fit to annul his certificate."

We think these instructions erroneous. Section 5065, 2 How. Stat., provides:

"The district board shall hire and contract with such duly-qualified teachers as may be required; and all contracts shall be in writing, and signed by a majority of the board on behalf of the district. Said contract shall specify the wages agreed upon, and shall require the teacher to

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keep a correct list of the pupils, and the age of each, attending the school, and the number of days each pupil is present, and to furnish the director with a correct copy of the same at the close of the school. Said contract shall be filed with the director, and a duplicate copy of the contract shall be furnished to the teacher. No contract with any person not holding a legal certificate of qualification then authorizing such person to teach shall be valid, and all such contracts shall terminate if the certificate shall expire by limitation and shall not immediately be renewed, or if it shall be suspended or revoked by proper legal authority."

Section 5155 provides that—

"The board of school examiners may suspend or revoke any teacher's certificate for any reason which would have justified said board in withholding the same when given, for neglect of duty, for incompetency to instruct or govern a school, or for immorality; and said board may, within its jurisdiction, suspend, for immorality or incompetency to instruct and govern a school, the effect of any teacher's certificate that may have been granted by other lawful authority."

This contract was made with express reference to these provisions, and the law carefully guards the rights of the patrons of the school, providing for a preliminary examination, and for the annulment of the certificate in case the board of examiners has made a mistake. If anything demonstrating the impropriety of submitting the question of the competency of a teacher to a jury for determination is required, it is furnished in this case. It appears that the board of examiners had a meeting to consider the propriety of annulling the certificate of plaintiff, and declined to do so. And yet pupils were called to give evidence to show that the plaintiff mispronounced certain words, such as telegraphy, Cuba, America, and others. Who is to furnish the standard for pronunciation? Just how broad must the "a" be sounded in pronouncing Cuba or America? Should these questions be left to the jury to determine?

The authorities on this question are not numerous, and

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the cases which have arisen are generally based upon the provisions of the statutes in force in the different States. The case of *Arnold* v. *School District*, 78 Mo. 226, goes to the extreme length of holding that the school board has not, under the statutes in force in that State, power to discharge a teacher for cruel treatment and profane and abusive language used towards pupils. We would not be prepared to follow this case. A better rule is stated in *Tripp* v. *School District*, 50 Wis. 651, in which case it was said:

"We think the only power which the board have to discharge a teacher is the power which they may exercise on behalf of the district when the teacher is guilty of some breach of his contract which, at common law, would justify an employer in discharging his servant, or when the teacher has lost all right to teach the school by reason of the annulment of his certificate in the way prescribed by the statute."

See, also, opinion of Maxwell, J., in *Bays* v. *State*, 6 Neb. 175. There is no difficulty in saying that a teacher is bound to treat his pupils in a humane manner, and that when he fails to do so he is guilty of a breach of his contract. But he contracts, so far as competency is concerned, to use the qualifications which it has been determined that he has, and none other.

Plaintiff also contends that there was error in permitting it to be shown that he failed to build fires and to keep the school-house comfortable. We think the parties themselves placed a construction upon the contract which imposed this duty upon plaintiff, and that he assumed that duty; that there was, therefore, no error committed in that regard.

Complaint was also made that the plaintiff did not keep a proper grade register. No such register was stipulated for in the contract. The evidence shows that the pupils were graded, but the grade of each was noted on a list alphabetically arranged. The defendant offered testimony to show a rule or regulation of the superintendent



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of public instruction requiring a grade register; but our attention is not called to any provision of law empowering the superintendent or school examiners to enlarge or modify the contract between the school board and the teacher. If the plaintiff kept such a list as the contract called for, the defendant was not authorized to demand anything more; certainly not until the close of his service. *School Directors* v. *Reddick*, 77 Ill. 628.

The other questions do not require discussion. As to the duty of plaintiff to seek other employment, and the burden of showing whether it could have been obtained, the cases of *Smith* v. *School District*, 69 Mich. 589, and *Farrell* v. *School District*, 98 Mich. 43, sufficiently cover the ground.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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## BANNISTER *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

RAILROAD CROSSINGS—CONTRIBUTORY NEGLIGENCE.

One who alights from a railroad train at a street crossed by the tracks of several different companies, and proceeds, without looking or listening, to cross the track of another road in front of an engine whose headlight is plainly visible, is guilty of such contributory negligence as will prevent a recovery for his death, although it does not appear that he knew of the existence of the second track.

Error to Wayne; Hosmer, J. Submitted June 17, 1897. Decided June 28, 1897.

Case by Augusta M. Bannister, administratrix of the estate of Elijah B. Bannister, deceased, against the Lake Shore & Michigan Southern Railway Company, for negli-

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gently causing the death of plaintiff's intestate. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*Whitney C. Beckwith*, for appellant.

*Wells, Angell, Boynton & McMillan*, for appellee.

LONG, C. J. Plaintiff's husband was killed at about 6 o'clock on the evening of February 4, 1893, at the crossing of Holden avenue and the track of the defendant in the city of Detroit. He had come to this crossing on a Grand Trunk suburban train. Holden avenue at this point is crossed by the Grand Trunk tracks. Next to it, and about 76 feet distant, are the defendant's tracks, and beyond that the Michigan Central tracks. Two other parties alighted from the Grand Trunk train at the same time the decedent left it. They passed along on the westerly side of the avenue, while Mr. Bannister took the walk on the east side. As these other parties came near the track, they saw the defendant's train, saw the headlight some 30 or 40 feet distant, and stopped until it passed by. The train was an ingoing one, and these parties were some 50 feet nearer it than Bannister. Two witnesses saw him approaching the track, saw the train, and testify that he walked along, looking ahead of him. He did not stop, did not look around, and was struck before he passed across the track. These were the only witnesses who saw the accident. Upon this testimony the court directed a verdict in favor of the defendant, on the ground of the decedent's contributory negligence.

Counsel for plaintiff contends here that the court was in error in this disposition of the case. He contends that the evening was dark; that there was smoke coming from the Grand Trunk train, and blowing over and across the defendant's tracks, at that time, and that the bell of that train was making some considerable noise; and that there is no showing but that the decedent was a stranger there, and consequently did not know of the existence of those

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tracks. We think the testimony shows conclusively that it was light enough to see some considerable distance. The other witnesses saw and heard the train without difficulty, and, had the decedent been giving any attention to his surroundings, the tracks there could not have escaped his attention. He had traveled some 76 feet after leaving his train before he came to this crossing of the defendant's tracks. There was nothing to obstruct his vision for several hundred yards down the track. The headlight was on, and one glance in that direction would have been sufficient to warn him of the approach of the train. Even after he saw the track, one or two steps less and he would not have been harmed. It is apparent that he approached the track without looking or listening. This court has many times held that for one on foot to venture blindly, and without the use of any care, upon a railroad track in front of a train, is negligence preventing recovery. *Mahlen* v. *Railway Co.*, 49 Mich. 585; *Pzolla* v. *Railroad Co.*, 54 Mich. 273; *Kwiotkowski* v. *Railway Co.*, 70 Mich. 549; *Gebhard* v. *Railway Co.*, 79 Mich. 586.

A motion for new trial was made and denied by the court below. Some question is raised upon that, but there is nothing in that fact which calls for discussion. It was properly overruled.

The judgment must be affirmed.

The other Justices concurred.

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## BAKER v. BARNETT PRODUCE CO.

PRINCIPAL AND AGENT — APPARENT AUTHORITY — SECRET LIMITATIONS.

One who sells cabbages not yet ready for the market to an agent held out to the public as having authority to contract for future delivery is not bound by a secret limitation between the principal and the agent that only cabbages ready for market can be contracted for by the latter.

Error to Berrien; Coolidge, J. Submitted June 17, 1897. Decided June 28, 1897.

*Assumpsit* by Vitelus M. Baker against the Barnett Produce Company for the breach of a contract to buy produce. From a judgment for plaintiff, defendant brings error. Affirmed.

*Lawrence C. Fyfe*, for appellant.

*E. L. Hamilton*, for appellee.

MONTGOMERY, J. This is an action for the breach of a contract by the terms of which defendant is claimed to have purchased of plaintiff his crop of cabbages, at stated prices, according to grade, to be paid for on delivery and inspection at the car. The defense claimed on the trial that there was no authority on the part of the agents of defendant with whom plaintiff dealt to make any contract of purchase, except a contract to buy cabbage then promptly ready for market.

The defendant has an office in Chicago, and owns a farm of some 500 acres in the southern part of Berrien county. It buys cabbages at Galien, and ships those purchased, together with its own product, to various markets. At its farm it employs as manager one Balmer, and in 1894 it also had in its employ a man named Green,

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who was subject to Balmer. Plaintiff testifies that he made a sale of his entire crop to Green, and Green corroborates him, and testifies that he was acting under instructions from Balmer in making the purchase, and that the terms were reported to Balmer. Plaintiff also testifies to facts showing a subsequent recognition of the bargain by Balmer.

The chief contention, and the only one which we need discuss, is that there was no authority on the part of Balmer to make a bargain for the purchase of any cabbages which were not then ready for delivery. It is not denied that he had the power to buy for future delivery, —that is, to contract for the delivery of a crop already in condition to deliver at a stated time, when the car should be placed,—but it is claimed that he had not authority to include in the contract cabbages not yet ready for the market. It is apparent, therefore, that he was held out to the public as having authority to contract for future delivery; and the plaintiff and others dealing with him would hardly be expected to suspect secret limitations on his power, depending upon whether the cabbages were in that stage of development at the time of the contract that they were growing better or worse pending the delivery. We think there was abundant testimony tending to show the contract alleged, and the holding out of Balmer as having the authority which he exercised.

Judgment affirmed.

The other Justices concurred.

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## ROUSH v. DARMSTAETTER.

APPEAL—BILL OF EXCEPTIONS — ASSIGNMENTS OF ERROR — COURT RULES.

A writ of error will be dismissed on motion where no assignments of error accompanied the bill of exceptions at the time of its settlement, as required by Circuit Court Rule 47, par. (e).

Error to Saginaw; Snow, J.

*Assumpsit* by William T. Roush against Rudolph O. Darmstaetter. From a judgment for defendant, plaintiff brings error. On motion to dismiss. Submitted June 15, 1897. Granted June 28, 1897.

*Lamson & Denfeld*, for the motion.

*John A. Combs* (*C. H. Gage*, of counsel), *contra*.

GRANT, J. A motion is made to dismiss the writ of error issued in this cause. It is time that the profession should understand whether this court will enforce paragraph (e) of Circuit Court Rule 47, or whether it may be ignored with impunity, and virtually abrogated. The provision of the rule is as follows:

"There shall accompany every bill of exceptions at the time of its service, and at the time of its settlement, a detailed assignment of all the alleged errors upon which the appellant proposes to rely. No bill of exceptions shall be signed unless accompanied by such assignment of errors, and no errors shall be considered by the Supreme Court that are not a part of such assignment."

This is a very proper case for a determination of the practice, for it involves no hardship to anyone. The case involves only $25, and has been tried once in justice's court and twice in the circuit court. No assignments of error were incorporated in the bill of excep-

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tions, and were not made or served until some days after the bill was signed. Under the rule, the judge had no right to sign the bill, and the errors assigned cannot be considered by us. The object of this rule is that the attention of the circuit judge may be called to the errors assigned, and that only such testimony as relates to the assigned errors shall be incorporated in the bill. This rule should be rigidly enforced by the circuit judges, and any case not settled in accordance with the rule should be promptly dismissed out of this court.

The motion is granted, and the writ dismissed, with costs.

LONG, C. J., HOOKER and MOORE, JJ., concurred with GRANT, J.

MONTGOMERY, J. Inasmuch as no motion is made to remand this case for resettlement, I concur in the result.

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## PEOPLE *v.* MOLONEY.

1. CRIMINAL LAW — RECEIVING STOLEN GOODS — PROOF OF FELONIOUS TAKING.

   Upon a prosecution for receiving stolen property, evidence that the barber shop of the complaining witness was broken open in the night-time, that, when he came there in the morning, nothing was in the place, and that the articles lost, which belonged to him, consisted of those described in the information, was sufficient to justify a finding that the property was feloniously taken.

2. SAME — IDENTIFICATION — EVIDENCE — QUESTION FOR JURY.

   The testimony of the complaining witness that one of the razors found in the respondent's possession had a rivet similar to that in one stolen from him, and that he had never seen any other razor with such a rivet, was sufficient to go to the jury upon the question of the identity of the property.

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Error to recorder's court of Detroit; Chapin, J. Submitted June 17, 1897. Decided June 28, 1897.

Michael Moloney was convicted of knowingly receiving stolen goods. Conviction affirmed.

*Walters, Humphrey & Walters*, for appellant.

*Allan H. Frazer*, Prosecuting Attorney, and *Henry A. Mandell*, Assistant Prosecuting Attorney, for the people.

MONTGOMERY, J. Respondent was convicted of the offense of receiving stolen property, knowing it to be stolen. The sole question presented on this record is whether there was any testimony tending to show that the offense was committed. We think the circumstances testified to by the complaining witness—*i. e.*, that his barber shop was broken open in the night-time; that, when he came there in the morning, there was not anything in the place; that it was all taken out; that the stuff he lost, which was his property, consisted of the property described in the information—tend to prove that the property was taken feloniously. *People* v. *Oblaser*, 104 Mich. 579.

The chief contention is that the witness did not identify the property. He testified that the property looked like his, and in answer to the question: "Will you look particularly, and see if there is anything about those that you recognize? Look at those razors, for instance,"—testified:

"This one here, with the rivet in it; that is the only way I could—

"*Q.* With the rivet?

"*A.* Yes.

"*Q.* You recognize that rivet, do you?

"*A.* I had a razor with a rivet.

"*Q.* Like that?

"*A.* Yes."

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On cross-examination he testified:

"*Q.* Those razors that you say look like yours; are you any more positive that those razors are yours than you are that that other stuff is yours?

"*A.* This one here—

"*Q.* Or do you testify that they simply look like yours? Do they look like yours, or are they yours?

"*A.* This one here is the only one. This one here.

"*Q.* What is the difference between this razor and the regular barber's razor?

"*A.* There isn't any difference except that I had a razor with a rivet in it.

"*Q.* Did you ever see a razor before that had a rivet in it?

"*A.* Yes; not like that, though."

We think this was some evidence of the identity of the property with that stolen, and was properly submitted to the jury. *Cole* v. *People*, 37 Mich. 544; *People* v. *Pitcher*, 15 Mich. 397.

Conviction affirmed.

The other Justices concurred.

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## PEOPLE v. RUSH.

1. CRIMINAL LAW—OFFENSE NOT TRIABLE BY JUSTICE—WARRANT —PRELIMINARY EXAMINATION.

   The examination of witnesses preliminary to the issuance of a warrant in a case not cognizable by a justice of the peace need not be reduced to writing.

2. SAME—JURISDICTION—SUFFICIENCY OF EVIDENCE—PRESUMPTION.

   Where the warrant issued in such case recites the examination of the complaining witness on oath, but does not show to what he testified, it will be presumed that the evidence was sufficient to authorize the issuance of the warrant, although the written complaint purports to have been made on information and belief. *People* v. *Whipple*, 108 Mich. 587, followed.

3. SAME—JURORS — CHALLENGE FOR CAUSE — RECORD ON APPEAL.

   Error will not lie upon the overruling of respondent's challenge for cause, where it does not appear from the record that he exhausted his peremptory challenges, or that the challenged person sat as a juror.

4. SAME — INTOXICATING LIQUORS — UNLAWFUL SALE — DETECTIVE AS WITNESS—DEFENSES.

   The fact that a witness to whom an unlawful sale of liquor was made was employed by the prosecuting attorney as a detective with a view to respondent's prosecution is no defense.

5. SAME—EVIDENCE—LEGISLATIVE RESOLUTION.

   A joint resolution of the legislature "authorizing the attorney general to commence legal proceedings to quiet title to certain lands in the township of Clay, St. Clair county, State of Michigan, in which this State has a legal interest," was not competent evidence to contradict that offered by the people, in a prosecution for illegally selling liquor upon such lands, to show that the sale was within the limits of St. Clair county.

6. SAME—UNSURVEYED LANDS.

   Unsurveyed lands within the boundaries of the various counties and townships of the State are not exempt from the operation of the general liquor law.

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7. SAME—SPECIAL LAWS—SUMMER RESORTS.

Act No. 116, Pub. Acts 1895, amendatory of an act entitled "An act to authorize the formation of corporations for the purchase and improvement of grounds to be occupied for summer homes, for camp meetings," etc., does not constitute a special law for the government of such places in such sense as to take them without the provisions of the general liquor law of the State.

Exceptions before judgment from St. Clair; Vance, J. Submitted June 17, 1897. Decided June 28, 1897.

Louis Rush was convicted of illegally selling intoxicating liquors. Affirmed.

*B. T. Prentis*, for appellant.

*Fred A. Maynard*, Attorney General, and *Joseph Walsh*, Prosecuting Attorney, for the people.

MOORE, J. The respondent was convicted of illegal sales of intoxicating liquors.

The first errors assigned relate to the insufficiency of the complaint, which was made upon information and belief. The record shows the written complaint to have been made upon information and belief. The complaint charges a specific offense by apt words and phrases. The warrant recites, after setting up the making of the complaint, and what it contained, "Whereas, on examination on oath of the said Joseph T. Minnie by me, the said justice of the peace, it appears to me, the said justice of the peace, that said offense has been committed, and there is just cause to suspect the said Louis Rush to have been guilty thereof." The warrant recites that Mr. Minnie was examined on oath, though it does not show to what he testified. *People* v. *Whipple*, 108 Mich. 587. It has been repeatedly held that the examination held before the examining magistrate before the warrant issues does not need to be reduced to writing. *People* v. *Bechtel*, 80 Mich. 630, and cases cited. The court did not err in refusing to dismiss the proceedings.

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It is assigned as error that the court erred in not sustaining respondent's challenge for cause to Mr. Spalding, who was offered as a juror. As the record does not show that Mr. Spalding sat as a juror, or that respondent had exhausted his peremptory challenges, it will not be necessary to discuss these assignments in detail. The examination, however, did not disclose that the challenge for cause was well taken. *Sullings* v. *Shakespeare*, 46 Mich. 408 (41 Am. Rep. 166); *People* v. *Barker*, 60 Mich. 277 (1 Am. St. Rep. 501); *People* v. *Aplin*, 86 Mich. 393.

The testimony disclosed that the sales were made to a man by the name of Kerr, who was accompanied by a detective, and also to the detective himself, who was in the employ of the prosecuting attorney for the purpose of learning whether illegal sales were made or not; and the court was asked to charge that the respondent could not be convicted of the offense charged, because the prosecution was based upon testimony furnished by the detective, for sales made to the detective, in the employ of the prosecuting attorney. The judge declined to so charge, and this is said to be error. This question was passed upon in the case of *People* v. *Everts*, 112 Mich. 194, and cases cited therein, and the decision was adverse to the contention of the respondent.

It was shown that the sales were made at Muir's Landing, on Harsen's Island, below the surveyed portion of the government survey. The treaty and convention between the United States and other powers, 1776 to 1887, showing the boundary line between the United States and Canada at the point indicated, was received in evidence. This was supplemented by testimony that where the sale was made was in St. Clair county. To contradict this testimony, respondent offered in evidence Joint Resolution No. 17, session of 1895, and the files in several cases commenced by reason of that resolution. The court rejected this testimony. As the files were not returned, we do not know what they contain, but the joint resolution was not competent evidence to show that these lands were not in

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the township of Clay, in the county of St. Clair, and State of Michigan, for it recites that the lands mentioned in the resolution are in said township.

It is urged that, as the land where the sale occurred was not surveyed by the government surveyor, it was not a violation of the law to make sales. There are scattered all through the State meandered streams, lakes, and swamps which have never been surveyed by the surveyors of the general government, but the lands are within the various counties and townships of the State. We are not prepared to decide that, if a person will but seek out these localities, he may engage in the sale of intoxicating liquors without complying with the provisions of the laws of the State.

It is claimed by the respondent that the sales were made at a summer resort, which is governed by special law relating to such places. Act No. 116, Pub. Acts 1895. I do not think anything could be further from the thought of the legislature in passing the law just quoted, which is an amendment to an act entitled "An act to authorize the formation of corporations for the purchase and improvement of grounds to be occupied for summer homes, for camp meetings, * * * and for the promotion of the cause of religion and morality," etc., than that they were so amending the liquor laws of the State as to permit the sale of liquors at such places without let or hindrance. We do not think the effect of the enactment of the law of 1895 was to suspend the general liquor law of the State.

The other assignments of error do not call for discussion.

The conviction is affirmed.

The other Justices concurred.

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## WHITE v. TAYLOR.

1. CONTRACTS—CONSIDERATION.
   Payment of part of the price, and a promise to pay the balance if an option to purchase should be exercised, are a sufficient consideration for a personal agreement by the seller's agent to return the payment with interest if the option should not be exercised.

2. SAME—DECLARATION—COMMON COUNTS.
   The common counts constitute a sufficient declaration upon a contract performed by the plaintiff, where nothing remains but the payment of money.

3. SAME—CORPORATIONS—SALE OF STOCK—SUBSTITUTED AGREEMENT.
   The president of a corporation who accepts from a prospective purchaser of corporate stock a written contract for the purchase of one share, together with a sum of money to be applied upon the purchase price, may, as a part of the same transaction, consent to the annulment of such contract, and to the substitution of an oral agreement that the payment should be so applied only if an option to purchase two shares should be exercised, and that otherwise it should be returned to the purchaser.

Error to Saginaw; Snow, J. Submitted June 18, 1897. Decided June 28, 1897.

*Assumpsit* by Justus A. White against Orson D. Taylor for money had and received. From a judgment for plaintiff, defendant brings error. Affirmed.

*Frank E. Emerick* and *James H. Davitt*, for appellant.

*John F. O'Keefe*, for appellee.

HOOKER, J. The plaintiff recovered a judgment for $100 against the defendant, upon a claim that he had paid that amount to him under an agreement that he

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should purchase from the Columbia River Fruit Company, an alleged Oregon corporation, of which the defendant professed to be president, two shares of the capital stock of said company, of the par value of $800, for the sum of $800, which agreement he asserts was to depend upon his subsequent determination, and that, if he should determine that he did not care to purchase such stock, the money was to be paid back by the defendant. He claims that he made a written contract for one share, and that, after it was signed, an oral agreement as above stated was made for two shares, thus taking the place of the written contract; the number of shares being changed in the writing, which never became operative as a contract. The defendant denies this version of the contract, and produced a writing, signed by the plaintiff, agreeing to take the two shares of stock, and pay therefor the sum of $800 to the company, which is the vendor named in the contract. The plaintiff sued to recover the money paid, and two juries seem to have credited his version. There seems to be no dispute that a valid oral contract might annul a former written one, and that a writing duly signed might remain inoperative until fully sanctioned.

It is contended by the defendant that this oral contract is void, because within the statute of frauds, in that it was not to be performed within one year. We think, however, that all of the evidence shows that it was to be performed within the year.

As to the consideration, the promise, though conditional, and the payment of $100, was sufficient consideration for a promise by defendant to repay it with interest if the plaintiff should elect to abstain from a purchase of stock.

The common counts constitute a sufficient declaration upon a contract performed by the plaintiff, where nothing remains but the payment of money. Numerous decisions of this court sustain this proposition.

To the contention that this money was not paid to the defendant individually, but as agent for the fruit com-

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pany, it is sufficient answer that the jury found otherwise, under an instruction that, if it was paid to and received by him as agent, plaintiff could not recover. It was competent for the defendant to agree personally to refund this money if he chose to do so. The jury have found that he did.

Counsel contend that this money, being paid upon the written contract, became the money of the company, and that the subsequent agreement, if made, did not have the effect of divesting the company of it. The plaintiff's claim is that this was all one transaction, and we have no hesitation in saying that this alleged president had power to annul the old contract by making a new one, in which case the company would have no claim to the money, and he would have no right to pay it to them. But, as already said, his agreement to repay, if personal, did not permit his liability to depend upon what he saw fit to do with the money. The charge was clear, and the evidence seems to justify the jury in their conclusion.

The judgment is affirmed.

The other Justices concurred.



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## KUNZE *v.* COX.

1. PARTNERSHIP — EXECUTION AGAINST INDIVIDUAL PARTNER — INTEREST SUBJECT TO LEVY.

   While an execution creditor of an individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners.

2. SAME.

   A levy, therefore, upon the interest of one partner in a specific pile of partnership lumber, which does not include the whole partnership property, is invalid.

3. SAME—TROVER—PARTIES.

   Partners have a joint right of action for the conversion of partnership property under an invalid levy and sale upon an execution issued against one of the partners.

4. TROVER—CONVERSION BY OFFICER—EVIDENCE.

   The fact that partnership property is wrongfully levied upon and advertised is not sufficient to establish a conversion thereof by the officer making the levy, but it must also appear, to render him liable in trover, that the partners have been deprived of the possession of the property, by removal or otherwise, under circumstances which show that the officer was legally chargeable with such deprivation.

Error to Iosco; Simpson, J. Submitted June 18, 1897. Decided June 28, 1897.

Trover by Emil E. Kunze and John Sullivan, copartners, against Thomas P. Cox, sheriff of Iosco county. From a judgment for defendant, plaintiffs bring error. Reversed.

*Albert E. Sharpe*, for appellants.

*M. J. Connine* and *N. C. Hartingh*, for appellee.

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HOOKER, J. The plaintiffs were copartners in the business of lumbering, and had certain lumber in different piles. It is claimed that the defendant converted two of these piles of lumber, by selling them separately, under different levies, upon an execution for the debt of Kunze, one of the copartners. There is evidence tending to show that the pile first sold was set off to Kunze by direction of Sullivan; but, however that may be, the defendant attempted to show that he sold only the interest of Kunze in that pile, and that the bidders and purchasers at the sale were told by him, and understood, that his interest only was offered, and that whoever should buy it would take the lumber subject to Sullivan's right, with whom the purchaser would be obliged to settle, and that Sullivan's interest could be had for three dollars per M. feet, which price Sullivan had consented to take if the defendant should sell the lumber. This lumber was removed by McDonald, the purchaser. The other pile of lumber was not removed by the purchaser, and remains where it was at the time of the sale. It is clear that it was partnership property, and there may be nothing to show that the sheriff ever took manual possession of or delivered the lumber to any one. He claims to have sold only Kunze's interest in this pile. The notice of sale advertised a seizure of the property on execution against Kunze and one Frank, and, continuing, said, "All of which I will expose for sale," etc. The notice of the other sale was substantially the same. To McDonald the defendant delivered a bill of sale of the lumber first sold, which stated that he "did advertise and sell the said lumber. * * * I hereby convey and set over to said McDonald all of said culls as levied upon, and all right, title, and interest acquired by and under said execution; and I hereby deliver possession thereof to him."

It is contended by the plaintiffs:

1. That these notices and bill of sale show a levy and sale of the entire ownership of the lumber levied upon, and that testimony tending to show a sale of

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Kunze's interest merely was inadmissible, as it contradicted the writings.

2. That the levies were void, because neither nor both included all of the partnership property, but specific articles of it merely, and that a valid levy must cover the partner's interest in the entire partnership property.

The action is trover, and, to sustain it, it was necessary that it be shown that some of this property was converted by the defendant. The fact that it was levied upon and advertised is not sufficient to establish a conversion. Some one must have taken it into possession, and deprived the plaintiffs of it, by removal or otherwise, under circumstances which show that the defendant was legally chargeable with such deprivation. If, therefore, a sale of Kunze's interest alone would have been valid under this execution, or if the plaintiffs were not deprived of their property, it was competent to prove that only Kunze's interest was sold, and that the lumber was never taken possession of or converted in any way. One of these piles of lumber was removed, and to some extent, at least, was converted. McDonald bought some interest in it, and took away all of the lumber in that pile. It does not appear that he ever adjusted the matter with Sullivan, and the latter denied having consented that a sale might be made upon the terms stated. If he did, it does not appear by any testimony that the sheriff sold the interest of both parties under this alleged permission, and it is hardly inferable from any testimony that Sullivan consented to a sale of Kunze's interest with the expectation that the purchaser and himself might afterwards adjust his interest at three dollars per M.; so that the remaining questions are (1) Whether this levy was upon lumber belonging solely to Kunze; and (2) if not, whether a levy upon the interest of one partner in a specific pile of partnership lumber, which did not include the whole partnership property, was valid.

The first of these questions is one of fact, and we cannot certainly say that the jury found with the defendant upon it. We cannot say that it was an undisputed fact. Upon

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the second, we think the trial court was in error in the conclusion that a valid levy upon a specific portion of the stock could be made. A want of uniformity of practice is found upon this subject, but the weight of authority sustains the doctrine that, while the execution creditor of the individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners. As the partner has not the right to appropriate to his own use, as against his partner, specific articles of partnership property, neither can the execution creditor, who cannot stand in a better position than the partner himself. The sheriff, therefore, cannot seize or deliver specific articles, and it may be doubtful if he can do more, in any case, than to sell the entire interest of the debtor, leaving the purchaser to secure his rights by proceedings for an accounting against the copartner of the debtor. This question will be found discussed in 2 Bates, Partn. § 1097 *et seq.*, and 1 Freem. Ex'ns, § 125, where numerous authorities are cited. In our own State this doctrine appears to have been approved. See *Sirrine* v. *Briggs*, 31 Mich. 443, where Mr. Justice COOLEY said:

"It is plain that he could not, by virtue of an execution against only one of the partners, proceed to levy, as he did, upon specific articles of the stock only. The levy in such a case must be upon the partner's interest in the whole stock, for the only individual interest that he has is his share in what shall remain after the partnership debts are paid and. the accounts between the partners adjusted."

Again, in *Lambert* v. *Griffith*, 50 Mich. 286, it was said: "The interest of a partner is generally his share of the assets after all accounts are settled among the partners, and the debts paid." In *Haynes* v. *Knowles*, 36 Mich. 407, an attachment upon specific chattels was held to be a trespass; and in *Hutchinson* v. *Dubois*, 45 Mich.

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143, it was held that a "partner's interest is not an interest in specific articles, but only in the surplus," etc., and "that the utmost extent of the officer's right, if he can levy at all, must be to seize the interest of the partner, whatever it may be, subject to all the partnership debts and to the final accounting." In that case the court said, further:

"But whether he took the whole or only part is immaterial. In either case he seized specific articles, when he had a right to seize an undivided and indefinite interest only. He did this also in total disregard of the plaintiff's rights; for whereas the judgment debtor, as partner, could only have had joint possession with the plaintiff, the officer, levying on his right, assumed to take exclusive possession and remove the property to another place. As was said by Mr. Justice CAMPBELL in *Haynes* v. *Knowles*, 36 Mich. 407, 410: 'The partner not sued cannot, on any principle of justice, be placed in any worse condition by a creditor of his partner than he could have been by his own partner.' At most, for the purposes of his writ, the officer only takes the debtor's place, and seizes an interest that can only be measured by final account. *Vandike* v. *Rosskam*, 67 Pa. St. 330."

It seems obvious that this levy was invalid, and if the defendant was a party to a wrongful conversion by McDonald, as his bill of sale seems to indicate, he might be liable.

The levy being void, there is no reason for denying the right of action by the partners jointly.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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## SHAKESPEARE *v.* BAUGHMAN.

1. CONTRACTS—MEETING OF MINDS—INSTRUCTIONS.
   In an action upon a contract resting in parol, where the versions of the transaction were so different that the jury might properly have found that the minds of the parties never met on any contract, a charge which conveyed the idea that the minds of the parties did meet, either on the contract alleged in the declaration or the one testified to by defendant, was reversible error, although a requested instruction that, unless the minds of the parties met upon the alleged contract, there could be no recovery, was given in the same connection.

2. SAME—ADEQUACY OF CONSIDERATION — LEGAL SERVICES — EVIDENCE.
   Evidence that the labor performed by plaintiff in obtaining the appointment of a guardian for an incompetent person was light in comparison with the amount which he alleges defendant agreed to pay for his services cannot be adduced by defendant to show an improbability that plaintiff's version of the agreement is correct, but the inquiry, if permissible at all, must be as to the value of the services *contemplated*, taking consideration of the contingencies.

3. SAME—QUALIFICATIONS OF ATTORNEY.
   Evidence that the plaintiff in such action is a lawyer of limited practice and experience is inadmissible on the question of probability, where defendant does not profess to have known anything about plaintiff's qualifications at the time the alleged contract was made.

Error to Van Buren; Buck, J. Submitted June 18, 1897. Decided June 28, 1897.

*Assumpsit* by William Shakespeare against Calvin Baughman for professional services. From a judgment for plaintiff, defendant brings error. Reversed.

*T. J. Cavanaugh* and *Alfred J. Mills*, for appellant.

*Heckert & Chandler*, for appellee.

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HOOKER, J. The plaintiff, a lawyer, recovered a verdict and judgment for professional services, rendered upon an alleged agreement to obtain the appointment of a guardian for an incompetent person for the sum of $700, $100 of which he admitted receiving. The case went to the jury upon the single question whether the contract alleged was proved. Counsel for the defendant attempted to cross-examine the plaintiff in relation to the amount and details of the work done. He also asked the plaintiff if he had tried contested cases frequently in the last 15 or 16 years. But the court sustained objections to the questions asked upon these subjects. It is said that this testimony was admissible, upon the question of the probability of the alleged contract.

The court was asked to charge the jury that, unless the minds of the parties met upon the alleged contract, there could be no recovery. This request was given, but the judge gave the jury to understand that the minds of the parties met upon that contract, or upon the one testified to by the defendant. What he said was equivalent to saying that there was no opportunity for the application of that rule, and he might as well have omitted that portion of the charge as to thus modify it. There was evidence of talk that the defendant was willing to pay $200 to have a guardian appointed, and he thought some of the other heirs (of whom there were six) would be willing to do so. Shakespeare testified that there was a talk of an hour or more, and it appears that one of the other heirs was present on one occasion. We cannot say that there was no opportunity for a misunderstanding, and therefore think that the case should have been submitted to the jury upon that question. *Constable* v. *Lefever*, (Sup.) 21 N. Y. Supp. 38; *Barney* v. *Fuller*, 133 N. Y. 605.

The defendant sought to show by the cross-examination mentioned that the plaintiff was a lawyer of limited practice and experience, and that the labor performed was light in comparison to the alleged contract price. As

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counsel suggested, this court has recognized the propriety of permitting a defendant to show known inadequacy of consideration for the purpose of corroborating a defendant where the parties dispute as to the terms of a contract. Thus, in *Campau* v. *Moran*, 31 Mich. 282, it was said:

"When the parties were thus distinctly at issue upon the terms of the contract, evidence that the cost of performance of such a contract as the defendant set up would be greatly in excess of the contract price would certainly afford some reasonable ground for believing that defendant is in error on the facts. We can very well conceive of cases in which such evidence might be very forcible,—much more so than it could possibly be in this case."

The same view was taken in *Richardson* v. *McGoldrick*, 43 Mich. 476. That was a case where the two parties were in conflict as to the terms of the contract, and Mr. Justice CAMPBELL said:

"In such a conflict of evidence between the only two persons knowing the facts, corroborating circumstances may very fairly be regarded."

Counsel cite also the cases of *Misner* v. *Darling*, 44 Mich. 438, and *Banghart* v. *Hyde*, 94 Mich. 49, where this rule is applied. It is noticeable that these are cases where the parties disagreed, and there was no other witness to the contract; and, as said by Mr. Justice LONG in the latter case, the evidence bears on the question of credibility. It will also be noticed that in *Campau* v. *Moran*, *supra*, the right to such testimony is based upon a conflict of testimony between the parties, and great inadequacy of consideration. Mr. Justice GRANT said in *Short* v. *Cure*, 100 Mich. 420, that "such testimony is admissible only in cases where the difference in value is so great as to be beyond the range of a fair difference in judgment."

While this court has been careful to limit such proof to cases where there was irreconcilable conflict between the parties upon the question, which all of those cases

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show, it has never distinctly held that such testimony was inadmissible in a case where one of the parties was corroborated by other witnesses to the making of the contract; and we are inclined to doubt that an arbitrary rule of that kind should be laid down. Counsel cite cases which do extend the rule. Thus, in Minnesota it does not seem to depend upon a want of corroborating witnesses. *Saunders* v. *Gallagher*, 53 Minn. 422; *Schwerin* v. *De Graff*, 21 Minn. 354. *Johnson* v. *Harder*, 45 Iowa, 677, seems to imply that great caution should be used in admitting such testimony, but does not limit it to cases where the parties only testify to the terms of the trade, as several witnesses were produced in that case.

The case of *Barney* v. *Fuller*, 133 N. Y. 605, is much such a case as this, where evidence of the value of the services was given; but it does not clearly appear that the value of the services actually rendered, as contradistinguished from those agreed upon, was proved. Here, if this kind of testimony was admissible at all, it would have been competent to show what the value of the services agreed upon was. This was not exactly what the question sought to do, the inquiry being directed to the services actually rendered in accomplishing the promised result. We may take judicial notice that, the contract being to accomplish a certain thing, the services required might depend upon the nature of the opposition; and it is not unreasonable to suppose that parties contracting to secure a certain result in legal proceedings to be commenced would contract with a view to the probable, if not possible, contingencies. Evidence of the value of the services contemplated, taking consideration of the contingencies, rather than of those actually found necessary, would bear upon the question, the latter being likely to throw very little, if any, light upon it. Were the element of uncertainty out of the contract, the services actually rendered and those agreed upon might be the same, and the many cases cited would be applicable. See *Cornell* v. *Markham*, 19 Hun, 275; *Cornish* v.

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*Graff*, 36 Hun, 160; *Knallakan* v. *Beck*, 47 Hun, 117; *Sturgis* v. *Hendricks*, 51 N. Y. 635. The exclusion of the answer to the question asked was not, in our opinion, erroneous.

We attach no great importance to the number of cases that had been tried by the plaintiff. There is nothing to indicate that the defendant knew anything about his qualifications, but rather that he did not, and therefore the answer, whatever it might have been, would not have increased the probability of the defendant's version.

For the error mentioned, the judgment is reversed, and a new trial ordered.

The other Justices concurred.

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## BUCHANAN *v.* MOORE.

ATTORNEYS AT LAW—INTEREST IN SUIT—DISMISSAL OF APPEAL.

In this case the attorney's protest against the dismissal of the appeal on petition of the parties to the litigation was overruled.

*Certiorari* to St. Clair; Vance, J.

*Mandamus* by Arthur L. Buchanan to compel Alexander F. Moore, circuit court commissioner, to issue a writ of restitution in summary proceedings brought before him wherein relator was complainant and one Joseph Marsh defendant. The application was granted, and, upon petition of Marsh, the proceedings were removed to the Supreme Court for review on *certiorari*. On relator's motion to dismiss. Submitted April 27, 1897. Granted June 28, 1897.

*Chadwick & McIlwain*, for the motion.

*R. L. Campbell, contra.*

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MOORE, J. Joseph Marsh filed a petition asking for a writ of *certiorari* to review the action of the circuit judge of the St. Clair circuit court in directing the above-named respondent to issue a writ of restitution in favor of the above-named relator, which would have the effect to put him in possession of certain real estate, in relation to which there has been litigation between said Buchanan and said Marsh. Since the petition was filed in this cause an affidavit has been filed with the court, made by said petitioner, in which he states, among other things, that he now recognizes the right of said Buchanan to have the exclusive possession of the land in controversy, and asks that these proceedings be discontinued. A stipulation has also been filed with the clerk of this court, signed by both Buchanan and Marsh, asking that the petition for *certiorari* be dismissed. The attorneys for Mr. Buchanan move the court to dismiss the proceedings. This motion is opposed by the attorney for Marsh, upon the ground that he and one Lemke have interests in the litigation which would suffer if the petition is dismissed.

It would not be profitable to any one to recite in detail the facts shown by the record. It is sufficient to say that an inspection of the record does not show any satisfactory reason why the parties to the litigation should not be allowed to end it if they desire to.

The motion to dismiss the proceeding is granted, without costs to either party as against the other.

The other Justices concurred.

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## ANN ARBOR SAVINGS BANK *v.* ELLISON.

MORTGAGES—FORGERY—APPEAL.

Upon a review of the evidence, the conclusion of the lower court that defendant never executed the mortgage sought to be foreclosed was affirmed.

Appeal from Wayne; Donovan, J. Submitted June 10, 1897. Decided June 28, 1897.

Bill by the Ann Arbor Savings Bank against Oscar L. Ellison and Mary D. L. Ellison to foreclose a mortgage. From a decree dismissing the bill as to defendant Mary, complainant appeals. Affirmed.

*James H. McDonald*, for complainant.

*V. J. Obenauer* (*Alfred Lucking*, of counsel), for defendant Mary D. L. Ellison.

MONTGOMERY, J. The bill in the present case was filed to foreclose a real-estate mortgage purporting to be executed by the two defendants, who are husband and wife and tenants in the entirety in the property covered by the mortgage. The mortgage was executed to Abraham S. Cody. The defense interposed by Mrs. Ellison is that the mortgage, as to her, was a forgery. It is conceded that Oscar L. Ellison signed the mortgage and accompanying note, and the complainant offered testimony tending to show that Mrs. Ellison signed the mortgage also, by her mark.

Oscar L. Ellison made a contract with Cody for the purchase of patent-right territory, and agreed to give a mortgage upon the property in question, and a deed of other property. The mortgage and deed were prepared, and taken to defendants' residence. The execution of the deed is admitted, and this was witnessed by the mother of Mrs. Ellison, who was living in the house. Her pur-

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ported signature to the mortgage was not witnessed by the mother, but by the notary and another witness, who had witnessed the signing by the husband. It appears by the undisputed testimony that during the negotiations the husband had stated to Cody and to Lowrie, the notary, that his wife would not sign the mortgage. His version is that Lowrie then said to him that, if he (Ellison) would sign the mortgage, he (Lowrie) could persuade Mrs. Ellison to sign it; that he executed it on this understanding, and accompanied Lowrie to the house; that the deed was signed; that Mr. Ellison then left the room for a few moments, returned to the room, inquired of Lowrie if all the papers were signed that it was necessary to sign, and was told that they were; that they then left to go down town, and Lowrie told him that he had secured Mrs. Ellison's signature. He further testifies that he learned the same night from his wife that she claimed not to have signed any papers except the deed. Mrs. Ellison and her mother both testify that but one paper was executed. This testimony was disputed by Lowrie, but it is significant that he did not inform Mrs. Ellison of the nature of the instrument, and this notwithstanding that he had previous notice that she had refused to sign the mortgage; and it is also significant that, while the deed was witnessed by the mother, no attempt was made to have an additional witness to the mortgage.

The circuit judge reached the conclusion that Mrs. Ellison never signed the mortgage. In a doubtful case, the determination of the trial judge, who has the opportunity of seeing the witnesses, is entitled to some weight, particularly in a case where there is a direct issue of veracity, and where the appearance of the witnesses upon the stand furnishes such direct aid in determining the fact.

On the whole case, we think the decree should be affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## FUCHS v. MEISEL.[1]

CHURCHES—SCHISM—PROPERTY RIGHTS.

Where all of the members and officers of a voluntary religious organization for years recognized themselves and the organization as belonging to the Evangelical Association of North America, submitted to its rules and discipline, and were supported in part by the general conference, it was not within the power of a bare majority of the local organization to withdraw from the association, and deprive those persons who represented the regularly organized body of the church, and were its regular appointees, from using the church property.

Appeal from Bay; Maxwell, J. Submitted January 14, 1897. Decided July 13, 1897.

Bill by John M. Fuchs and others to restrain Herman Meisel and others from interfering with the administration of the affairs of Zion's Church, Bay City, in accordance with the rules and discipline of the Evangelical Association of North America. From a decree dismissing the bill, complainants appeal. Reversed.

*T. A. E. & J. C. Weadock*, *Edward B. Esher*, and *William Ritchie*, for complainants.

*Van Kleeck & Anneke*, for defendants.

GRANT, J. After the former decision of this court (102 Mich. 357), the case was remanded, issue properly joined, proofs taken in open court, and a decree entered dismissing the bill. The issues involved and the principles governing the case were fully discussed and enunciated in that opinion. The only question, therefore, now before us, is, have the complainants brought themselves within

[1] Rehearing denied September 15, 1897.

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the allegations of the bill? We said in that opinion (page 374):

"If complainants maintain the allegations of their bill, —that they represent the regularly organized body of the church, and are its regular appointees,—they are entitled to the relief prayed."

All the material allegations are established by the proofs, and a discussion of the evidence would be useless. From the inception of the church at Bay City down to 1893, when the attempted withdrawal was made by a standing vote of the congregation, which vote did not represent more than one-half of the church members, all the members and the officers of this church recognized themselves and their organization as belonging to and being a part of the Evangelical Association of North America. They were governed by its rules and discipline, were supported in part by the general conference, and received donations from it for the purchase of their property. In all their deeds and papers they referred to themselves as "Zion's Church of the Evangelical Association of North America." Complainants Hettler and Fuchs represented the regular general conference and body of the church, and, under its rules and discipline, were entitled to the use of the church and parsonage and the other emoluments of their offices.

The decree is reversed, and a decree entered in this court for the complainants, with costs of both courts.

The other Justices concurred.

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## *In re* BREWSTER'S ESTATE.[1]

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1. APPEAL FROM PROBATE COURT — ADMINISTRATOR'S ACCOUNT — EXTRAORDINARY SERVICES—QUESTION FOR COURT.

   On an appeal from the allowance to an administrator in his final account of a sum for extraordinary services, the question of fact as to whether any such services were rendered was properly reserved by the court for its determination, without submission to the jury.

2. SAME—FINDINGS OF FACT—EVIDENCE.

   The circuit judge was justified in finding that the administrator rendered extraordinary services, entitling him to extra compensation, where it appeared that, for some time after the intestate's death, he advised with a surviving partner of the latter in respect to the partnership business, and entered actively into the management of the financial affairs of the firm, and, after a sale of the interest of the deceased, procured, through arbitration, a reduction of $1,000 in the amount of a claim for carrying on the business, preferred against the estate by the surviving partner.

3. EXECUTORS AND ADMINISTRATORS — DEPOSIT OF MONEYS — LIABILITY FOR INTEREST.

   An administrator who deposits estate money, amounting to $36,000, subject to check, instead of upon certificate, and allows it to remain in such account for 3 months and 12 days, is chargeable with interest thereon at bank rates.

4. SAME—ACCOUNTING—RES JUDICATA.

   The administrator is not relieved from liability for such interest because the question was not raised upon the first accounting after the distribution of the principal among the heirs, but it is a proper charge against him in his final account.

5. COSTS ON APPEAL — PRINTING OF RECORD AND BRIEF — WHEN LIMITED.

   The decision of the circuit judge being sustained save for a single modification, the number of pages of record and briefs for which appellant was allowed costs of printing was limited to that reasonably necessary to present the question determined in his favor.

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[1] Rehearing denied January 18, 1898.



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Error to Wayne; Lillibridge, J. Submitted April 7, 1897. Decided July 13, 1897.

Frances M. Britton appealed from an order allowing the final account of Albert Ives, Jr., as administrator of the estate of James E. Brewster, deceased. The order of the probate court was affirmed in the circuit, and said Britton brings error. Modified and affirmed.

*James H. Pound* (*Ralph Phelps, Jr.*, of counsel), for appellant.

*Dickinson & Thurber* and *Charles B. Warren*, for appellee.

MONTGOMERY, J. This is a proceeding to review an order allowing the final account of Albert Ives, Jr., administrator of the estate of James E. Brewster, deceased. The items of the account contested were a claim for extra compensation of $1,000, and a charge for attorney's fees for services rendered the estate. The estate was inventoried at $160,032.47. $63,091.90 consisted of the interest of the deceased in the partnership of Brewster & Stanton, a firm engaged in the wholesale clothing and furnishing trade in Detroit. There was $2,070.57 of other personal property, and the balance of the inventory was made up of real property. A large part of the personal property was converted into money, the debts of the estate paid, and the balance of the estate in a large part divided among the heirs prior to the 27th of February, 1888, at which time the administrator filed an account with the probate court. In that account he asked for $1,624.89 for services and expenses. The account was allowed as presented, leaving a balance in the hands of the administrator of $418.09. After this date a claim was made by Marvin M. Stanton against the estate, which was subsequently arbitrated, and this arbitration was not concluded until the 20th of April, 1891. On the 28th of July, 1891, the administrator filed his present account. The account

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was allowed by the probate court, and an appeal was taken to the circuit, but the case was not brought on for trial until February, 1896. The circuit judge affirmed the order of the probate court, after having submitted to the jury the question of the reasonableness of the attorney's fees. The jury found the value of the attorney's fees to be as fixed by the probate court.

An exception was taken to the refusal of the circuit judge to submit to the jury the question of fact as to whether any extraordinary services were rendered for which compensation should be allowed the administrator, but we think the circuit judge followed the correct practice in determining this question.

The character of the services was very similar to those rendered in *Mower's Appeal*, 48 Mich. 441. It appears by the finding of the circuit judge that the copartnership still had one year to run at the time of the death of Mr. Brewster; that, immediately after his appointment, the administrator, being in the confidence of the surviving partner, continued to advise as to the value and condition of the property, and from that time until the sale of deceased's interest in the firm he advised with him almost every day, and frequently several times a day; that this advice covered the subject of purchases and sales, and, in general, the financial affairs of the firm; that the surviving partner did not feel himself capable of assuming the responsibility of that part of the business, and that the administrator actively entered into the management of that part of the business, in connection with the surviving partner, with the intention to give sufficient time to it to do it justice; and that this continued until the sale of the estate's interest, which occurred on the 2d of June, 1887. The surviving partner subsequently made a claim against the estate for $4,000 for carrying on the firm's business. The administrator disputed this claim, which was subsequently submitted to arbitration, and allowed in the sum of $3,000. The administrator proposed, and succeeded in carrying through, this arbitration. We think there was

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sufficient evidence to justify the circuit judge in finding that this service was extraordinary and unusual, and, as was held in *Mower's Appeal*, 48 Mich. 451, where facts exist calling for the exercise of judicial discretion, we are not at liberty to interpose the judgment of this court in place of that of the circuit judge; certainly not except in the case of clear abuse, which does not appear here.

A number of assignments of error are based upon the rulings of the court in admitting testimony, but these need not be discussed, as we are convinced that no error was committed which has resulted in prejudice to the appellant in this regard.

We are not able to agree with the circuit judge as to one of the items. The court refused to charge the account of the administrator with interest. It appears by the testimony that, on the sale of the copartnership property, there was deposited in the bank with Ives & Sons, of which firm the administrator was a member, the avails of this sale, amounting to some $36,000, and that this sum remained on deposit for some 3 months and 12 days before it was divided among the heirs. It is true the testimony shows it was deposited subject to check, but it might have been deposited on certificate had the administrator taken the precaution to do so, and we think he should be charged with bank rates on this deposit, which are shown by the testimony to amount to $274.32. The circuit judge seems to have been of the opinion that this charge of interest should have been made at the first accounting; that the account then showed that this money had come into the hands of the administrator, and been disbursed; but we think the item is not in fact involved in the account, and it is not in accordance with the theory of the administrator that the account was final.

We think the allowance should be reduced in the sum of $274.32, and in other respects the order of the circuit judge will be affirmed. The appellant will recover costs of this court; but, as we think the record needlessly full for raising the only question upon which the decision of

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the circuit judge was not sustained, the costs of printing the briefs and record will be limited to 50 pages.

The other Justices concurred.

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SCRANTON *v.* WHEELER.

1. JURISDICTION OF COURTS—UNITED STATES INTERESTS—DEFENSE IN EJECTMENT.

The fact that a defendant in ejectment is in possession of the disputed premises on behalf of the general government is insufficient to deprive the court of jurisdiction, but, to constitute a defense, it must appear that the right of the government is paramount to that of the plaintiff.

2. RIPARIAN RIGHTS—NAVIGABLE STREAMS—IMPROVEMENTS BY UNITED STATES.

The title of the riparian owner to submerged lands along navigable waters, and his right of access thereto, are subject to the paramount right of the United States to use the land in aid of navigation, without compensation to the owner, in such manner as it shall determine to be necessary.

Error to Chippewa; Steere, J. Submitted April 9, 1897. Decided July 13, 1897.

Ejectment by Gilmore G. Scranton against Eben S. Wheeler. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

This case originated in the circuit court of the county of Chippewa in May, 1891, to recover possession of the following-described parcel of land:

"An undivided one-half interest or portion of, in, and to private land claim number 3, Whelply's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's

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river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the plaintiff claims in fee."

The defendant was then the superintendent of the St. Mary's Falls Canal, under the authority of the United States government. After issue was joined, a petition was filed by the defendant for the removal of the cause to the federal court, for the reasons (1) that defendant was in possession for the United States, as superintendent of the canal, and that the United States was the real party in interest; (2) that the suit arose under the laws of the United States. Thereupon the suit was removed, and was tried in the circuit court of the United States for the Western district of Michigan, September 14, 1892, resulting in a judgment for the defendant. The case was then removed by a writ of error to the United States court of appeals, and there affirmed. 6 C. C. A. 585, 57 Fed. 803. It was then appealed to the Supreme Court of the United States, and dismissed from that court, and remanded to the state court for trial, for the reason that the pleadings did not show any federal jurisdiction. Thereupon trial was had in the state court, resulting in a judgment for the defendant, and the case is now in this court on a writ of error.

*Harlow P. Davock* and *John C. Donnelly*, for appellant.

*John Power*, U. S. District Attorney, for appellee.

GRANT, J. (*after stating the facts*). 1. The learned circuit judge directed a verdict for the defendant upon the ground that the judgment against the defendant, Wheeler, would, in effect, be a judgment against the United States and its property. In this the court was in error. When one in the actual possession of property defends his right of possession upon the ground that the government, state or national, has placed him in possession, he must show that the right of the government is paramount to the right

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of the plaintiff, or judgment will go against him. This point has been settled by the decision of the Supreme Court of the United States rendered May 10, 1897. *Tindal* v. *Wesley*, 167 U. S. 204. In that case the authorities upon this point are reviewed at length, including the case of *Stanley* v. *Schwalby*, 162 U. S. 255, upon which defendant mainly relies.

2. The United States government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them. That the improvements made were necessary to aid and protect this navigation is established beyond dispute. Had the government the right to make these improvements upon the submerged land without compensation to the adjoining owner? It is conceded that under the law of Michigan the title to submerged land is in the adjoining owner to the thread of the stream. It is insisted in behalf of the plaintiff that the government possesses no right to so use his land, although submerged, and although necessary to so use it in aid of navigation, as to cut off his access to the open water. It is contended on the other hand that this title to submerged lands along navigable waters, and the right of access thereto, are subject to the paramount right of the United States to use this land in such manner as it shall determine to be necessary in aid of navigation. The court of appeals was unanimous in its opinion against the plaintiff's claim. In a very able opinion delivered by Judge Lurton the facts are clearly stated, the authorities cited, and we think the conclusion there reached is the correct one. We therefore deem it unnecessary for us to enter into a long discussion of the law and the authorities. The case of *Hawkins Point Lighthouse*, 39 Fed. 77, appears to be exactly in point, and to rule the present case.

We think the conclusion reached by the court below was a correct one, although it gave a wrong reason.

The judgment is affirmed.

The other Justices concurred.

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## HOGAN *v.* HADZSITS.[1]

1. LIMITED PARTNERSHIPS—RENEWAL AFFIDAVIT—STATUTORY REQUIREMENTS.

   At the expiration of the period covered by articles of special partnership, like articles were signed, reciting that the special partner had "contributed to the capital stock of the firm the sum of $10,000." The affidavit of one of the general partners recited that the special partner had actually, in good faith, contributed such sum in cash to the capital stock. At the expiration of the period covered by the new articles, the firm went out of business, and a sale of the partnership property under a mortgage failed to bring enough to pay unsecured creditors. In an action by a creditor for goods sold to the firm, it was contended that the certificate and affidavit were false, in that they stated the contribution of the special partner to be in cash, whereas it consisted of his interest in the partnership which had expired, and that, in consequence of the alleged false statement, the special partner was liable under 1 How. Stat. § 2349, for all the engagements of the general partners. *Held*, that the execution of the new articles was in effect a renewal of the former partnership in accordance with section 2352, 1 How. Stat., and that the statement in the renewal affidavit should be referred to the time of the formation of the partnership.

2. SAME—WITHDRAWAL OF INTEREST—LIABILITY TO CREDITORS.

   To render a special partner liable for firm debts on account of his withdrawal of interest or profits, one of the conditions prescribed by 1 How. Stat. § 2355, to wit, the reduction of the capital stock below the sum stated in the certificate, or the insufficiency of the assets to pay the partnership debts, must exist.

Error to Wayne; Frazer, J. Submitted June 9, 1897. Decided July 13, 1897.

*Assumpsit* by Walter G. Hogan against George Hadzsits, Herman Beckmann, and Herman Rohns, formerly

[1] Rehearing denied September 23, 1897.

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copartners as George Hadzsits & Company, for goods sold and delivered. From a judgment for defendants, plaintiff brings error. Affirmed.

*Bowen, Douglas & Whiting*, for appellant.

*John W. McGrath*, for appellee Rohns.

MOORE, J. February 4, 1888, the firm of George Hadzsits & Co. was organized. Herman Rohns was the special partner. The other two defendants were the general partners. The special partner contributed to the capital stock of said firm the sum of $10,000 in cash. The partnership was to terminate on the 3d day of February, 1892. There is no question raised as to these papers being properly executed to create a limited partnership. At the expiration of this partnership, like articles of special partnership were signed, reciting that the partnership was to commence on the 4th day of February, 1892, and to terminate February 3, 1896. The articles recited that "said Herman Rohns, special partner as aforesaid, has contributed to the capital stock of said firm the sum of $10,000." These articles of copartnership were acknowledged February 6, 1892, and on the same day there was attached to said articles an affidavit of the general partner Hadzsits, who swore "that the said Herman Rohns, who is therein named as special partner, has actually, in good faith, contributed in cash to the capital stock of said business the sum of $10,000." The record shows that Mr. Rohns did not contribute any cash to the capital stock of said partnership after February 4, 1888. It also shows that February 6, 1892, the excess of the assets of the firm over its liabilities to persons other than the partners was upwards of $34,000, and exclusive of all liabilities, including the liability to the partners, was upwards of $4,000. The contribution of Mr. Rohns to the firm in February, 1892, was his interest then in the firm. The record shows this was worth upwards of $10,000. After February, 1892, Mr. Rohns drew out

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of the firm, at intervals, sums of money which amounted, during the four years the partnership continued to exist, to $3,850, under an arrangement between the partners by which he was to be allowed 10 per cent. on the amount of his investment as interest. On the trial the jury found, in answer to a special question submitted to them, that the property of George Hadzsits & Co. was sufficient on the 6th day of February, 1896, to pay the partnership debts. At the expiration of the second partnership, in February, 1896, the firm went out of business, having given chattel mortgages on all its property. These chattel mortgages were foreclosed. The property did not bring enough to pay the unsecured creditors. It was the claim of the defendants that the property was sacrificed at the chattel-mortgage sale. The plaintiff has a claim of about $1,800 against the company, for which he seeks to hold the special partner.

There are two questions involved:

*First.* Does the fact that Mr. Hadzsits stated in his affidavit made February 6, 1892, that Mr. Rohns had contributed in cash to the capital stock $10,000, when the cash was in fact contributed in 1888, make Mr. Rohns a general partner?

*Second.* Was the withdrawal from the firm by Mr. Rohns of sums of money as interest on his investment such a withdrawal of the capital stock as to make Mr. Rohns liable to the plaintiff for the amount of his claim, to the extent of the amount so withdrawn?

As to the first question, the trial judge charged the jury:

"It is a fact under the evidence in the case, and under the certificate filed and signed by the partners, that the amount of capital stock stated in the certificate was $10,000, which was put in by Mr. Rohns, either in money, or in something equivalent to money, which I charge you is a substantial compliance with the law."

As to the second question, he instructed the jury that the capital stock of the company must be kept intact, and left it to the jury to say whether it had been impaired by the withdrawal of the money from the firm by Mr. Rohns.

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The appellant insists that the disposition of each of these questions by the trial judge is error. It is said on the part of the appellant that:

"1 How. Stat. § 2344, requires the execution by all the members of a special partnership of a certificate which shall state, among other things, 'the amount of capital stock which each special partner shall have contributed to the common stock.' Section 2346 requires that the certificate shall be filed with the clerk of the county in which the principal place of business of the partnership is to be situated. Section 2348 provides that, at the time of filing the certificate and the acknowledgment, an affidavit of one or more of the general partners shall be filed in the county clerk's office, 'stating that the amount in money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually, and in good faith, contributed and applied to the same.' Section 2349 provides: 'No such partnership shall be deemed to have been formed until such certificate, acknowledgment, and affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners.' The testimony shows that, to the capital stock of the partnership which was in existence when plaintiff's assignors sold the goods on which this action is based, the special partner, Rohns, had not in good faith contributed in cash the sum of $10,000. He contributed his interest in the partnership which had expired on February 3, 1892,—an interest the value of which was entirely problematical. It might or might not have been of substantial value, and whether it was or not could only have been ascertained after payment of the partnership debts, and a sale of the excess of the assets, if any excess there was."

It is the contention that the statement made in the affidavit that Rohns had contributed in cash to the capital stock of the company $10,000 was not true; that the statute must be strictly followed, and the statutory result of the false statement is that Rohns is liable as a general partner for all the partnership engagements; citing Bates, Lim. Partn. pp. 56, 60, 61; *Pierce* v. *Bryant*, 5 Allen, 91;

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*Haviland* v. *Chace*, 39 Barb. 283; *Haggerty* v. *Foster*, 103 Mass. 17; *Richardson* v. *Hogg*, 38 Pa. St. 153; *Eliot* v. *Himrod*, 108 Pa. St. 578; *Vanhorn* v. *Corcoran*, 127 Pa. St. 265; *Haslet* v. *Kent*, 160 Pa. St. 85; *Durant* v. *Abendroth*, 69 N. Y. 151 (25 Am. Rep. 158); *First Nat. Bank* v. *Huber*, 75 Hun, 80.

These cases undoubtedly hold that contributions of United States bonds, or of promissory notes or acceptances, or of a stock of goods, or of the property or assets of another partnership, are not to be regarded as payments in cash, in the formation of limited partnerships. Many of these decisions were in States which require the contribution to the capital stock made by the special partner to be made in cash, while in our State the contribution may be made in cash, or other property at cash value. We do not think, however, a fair interpretation of this record will show that what was attempted to be done, or what was in fact done, was the creation of an original limited partnership. It was rather the renewal for another period of four years of a limited partnership then in existence; continuing the same business with the same partners and with the same assets which belonged to the firm at the expiration of the term for which the original articles of partnership provided. Section 2352, 1 How. Stat., provides for the renewal or continuance of such partnerships, and that "a certificate shall be made, acknowledged, recorded, and published in the like manner as is provided in this chapter for the formation of limited partnerships," etc. It is unfortunate, perhaps, that the statute does not provide just what this certificate shall contain. In Bates, Lim. Partn. § 122, it is said:

"Considering how utterly inadequate in its instructions this section of the statute is [he is discussing statutes of similar import to ours], it is astonishing that there have been no more decisions upon it. The statute requires the renewal to be certified as in the original formation. As the certificate of formation certified a cash contribution, or in specific articles at a valuation, it is obvious that a literal compliance with the statute is impossible, and no instructions are given to guide us."

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If there cannot be a literal compliance with the statute, is it just to say that, if there has been a substantial compliance with the statute, and an attempt, in good faith, to comply with its terms, the special partner shall be made a general one because the impossible was not done?

"The difficulty is to know how minute must be the information to be contained in these documents. A going business is often not susceptible of exact estimate as to its own standing, capital, etc. Its standing of one day is not its standing of the next day, not only because new contracts may be made and old ones completed, and new debtors and creditors created, but because the ebb and flow of markets make the value of the stock a constantly fluctuating amount; and unseen changes in the ability and solvency of those indebted to the firm may affect it to a high degree without any of the partners being at all aware of any change. Moreover, the capital, which originally was cash, is no longer so. It has now become a stock of goods, or improvements, or property and credits. It is perfectly plain that the renewal certificate cannot state that there is a present cash capital, or its accurate value. It would therefore seem that the statute should be construed as allowing a renewal regardless of the condition of the association; that the statutory certificate, record, affidavit, and publication need contain no new matter not in the original certificate, except the statement that the partnership is renewed for a certain further time; and that any other matter analogous to the re-recording of a mortgage of personalty is practically a re-statement of the original facts. Such, judging from the statements of facts in the cases of renewals, had been the practice." Bates, Lim. Partn. § 127.

Doubtless this was the view held by the person who prepared the certificate and affidavit for the purpose of renewing the partnership. We do not think it unreasonable to say that the statute contemplates that the renewal certificate and affidavit are to be read in connection with the original certificate and affidavit. If this is done, no one can be misled. It would appear from such a reading that the limited partnership was created in 1888; that at that time Mr. Rohns contributed in cash to the capital stock of the company $10,000; and that four years later the limited

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partnership was continued for another four years. We have not overlooked the decision of *Haddock* v. *Grinnell Manfg. Corp.*, 109 Pa. St. 382, which reads:

"When a special partnership is continued or renewed, it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired. It must be in such condition as to be available for creditors, and it is the duty of the general partner to furnish this information in his affidavit. If this duty is neglected, the partnership becomes general, and the special partner has no immunity."

The Pennsylvania court held substantially the same doctrine in relation to limited partnership associations, but this court declined to follow that doctrine in the recent cases of *Staver & Abbott Manfg. Co.* v. *Blake*, 111 Mich. 282, and *Rouse, Hazard & Co.* v. *Detroit Cycle Co.*, Id. 251. We think such a construction reads into the statute provisions it does not contain. The court did not err in his disposition of the first question raised.

Counsel for appellant insist that under the provisions of section 2355 the special partner is made liable, to the extent of any unpaid debts, for all sums withdrawn from the firm, and that as the record shows the plaintiff is unpaid, and the special partner withdrew more than the amount of the plaintiff's claim, the judge should have directed a verdict in his favor. The statute provides for liability for interest or profits withdrawn only in case the withdrawal reduces the capital stock below the sum stated in the certificate, or if, at any time during the continuance or at the termination of the partnership, the property or assets shall not be sufficient to pay the partnership debts. Both of these propositions were submitted to the jury, who found that the capital stock had not been impaired, and that at the termination of the partnership there were assets sufficient to pay the partnership debts.

The judgment is affirmed.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## FOWLER v. FOWLER.

1. SLANDER—DAMAGES—EVIDENCE IN MITIGATION — INSTRUCTIONS.
   Where, in an action for slander in imputing to plaintiff a want of chastity, defendant produced testimony tending to show that, at the time of the alleged slander, plaintiff's reputation for chastity was bad in the neighborhood in which she resided, defendant was entitled to an instruction that, if it should be found that a general rumor already prevailed in the neighborhood of the same tenor as the words charged, plaintiff should not recover as much damages as if no such rumor prevailed.

2. SAME.
   The failure to give such instruction was not justified by the fact that it was claimed by the plaintiff that the defendant was himself responsible for some of the rumors, since the proposed instruction was proper in the abstract, and might have been qualified, if desired by the plaintiff, so as to exclude rumors started by the defendant himself.

3. SAME—QUO ANIMO.
   A defendant in an action for slander may show in mitigation of damages, as bearing on the *quo animo*, that, before uttering the words imputed to him, he had been informed that stories to the same purport as his subsequent statement were already afloat in the neighborhood.

Error to Hillsdale; Lane, J. Submitted April 14, 1897. Decided July 13, 1897.

Case by Kate Fowler against Frederick Fowler for slander. From a judgment for plaintiff, defendant brings error. Reversed.

*Chester & Twiss* (*T. E. Barkworth*, of counsel), for appellant.

*C. M. Barre* and *E. J. March* (*Watts, Bean & Smith*, of counsel), for appellee.

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MONTGOMERY, J. This is an action of slander. The defendant is accused of making accusations against the plaintiff, imputing to her a want of chastity. Plaintiff is the widow of defendant's son. The jury rendered a verdict of $10,000. This verdict was afterwards reduced to $6,000 on an order of the circuit court requiring such reduction or granting a new trial. On the trial the defendant produced testimony tending to show that, in the spring and summer of 1893, the plaintiff's reputation for chastity was bad in the neighborhood in which she resided. At the conclusion of the testimony the defendant preferred the following requests, which were refused:

"If you find that the defendant spoke the words as charged, and find under the evidence and these instructions he has failed to establish his justification, and you further find that a general rumor already prevailed in the neighborhood where plaintiff lived of the same tenor as the words charged, then she could not be entitled to as much damage as if no such rumor prevailed.

"If you believe from the evidence that, at the time of the publication, the plaintiff was a woman of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity and virtue is bad cannot suffer the same damage as a woman of good reputation would if words were spoken about her that reflected upon her chastity."

We think these instructions should have been given. *Nellis* v. *Cramer*, 86 Wis. 337; *Campbell* v. *Campbell*, 54 Wis. 90; *Burt* v. *McBain*, 29 Mich. 268; *Orth* v. *Featherly*, 87 Mich. 320; Newell, Defam. 890.

Plaintiff's counsel contend that the record shows that defendant himself was responsible for the rumors which existed before and at the time of the utterance of the substantive slander alleged and proved. We do not think this conclusion appears. But it is urged that the requests should have been so framed as to exclude from the rumors which would mitigate damages those which defendant himself started, if any. But defendant's theory was that he acted upon information of others, and that he did not originate the rumors. The requests were framed in ac-

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cordance with this theory of defendant, and if peculiar circumstances existed, requiring a modification of the instructions, we think the plaintiff should have called attention to them, or the court, of its own motion, might have properly qualified the instructions. But the requests were proper in the abstract, and were proper if the defendant's theory was maintained, and there was a total failure to cover the ground. We think this was damaging error.

Defendant also offered to show that he had a conversation with one Eddy, in which Eddy told him (defendant) of stories afloat in the neighborhood which were substantially those which defendant was charged with circulating. This was excluded on the ground that, before evidence of such statements could be received, it must be shown that they were rumors in common circulation. The question presented is whether, as bearing on the *quo animo*, a defendant may show that, before uttering the words imputed to him, he had been informed that the statements made by him were true, for the purpose of mitigating damages. We think it should be held that such testimony is admissible. *Simons* v. *Burnham*, 102 Mich. 200; *Huson* v. *Dale*, 19 Mich. 35 (2 Am. Rep. 66); *Orth* v. *Featherly*, 87 Mich. 319; Newell, Defam. 890.

The other questions presented are not likely to arise on a new trial.

Judgment reversed, and a new trial ordered.

The other Justices concurred.



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## DE CREMER *v.* ANDERSON.

CONTRACT OF GUARANTY — NOTICE OF ACCEPTANCE — WHEN REQUIRED.

Notice of acceptance is essential to bind as guarantors persons who, in response to the request of the principal, sign a guaranty for the payment of goods to be sold him on credit, where the offer of the guarantee to sell the goods was conditional upon his approval of the guarantors

Error to Marquette; Stone, J. Submitted April 16, 1897. Decided July 13, 1897.

*Assumpsit* by Florian De Cremer against William F. Anderson and Abraham Boulsom upon an alleged contract of guaranty. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

*J. M. Edgerton* (*Clark & Pearl*, of counsel), for appellant.

*McClear & Bell*, for appellee Anderson.

*Ball & Ball*, for appellee Boulsom.

MOORE, J. Julius Jacobson desired to buy goods of the plaintiff. The plaintiff sent him a blank paper reading as follows:

"For the purpose of enabling Julius Jacobson to purchase goods upon credit from F. De Cremer, of Green Bay, Wis., we hereby guarantee that said Julius Jacobson shall promptly pay him for all goods which he may hereafter sell to him upon credit, until this guaranty is revoked; said payment to be made within 10 days after receiving goods. Our liability hereunder shall cover any balance to become due, not exceeding $300."

This was afterwards dated May 2, 1894, and signed by defendants. When this paper was sent to Jacobson, he

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was instructed to have it signed by responsible parties, and if plaintiff, upon investigation, was satisfied of their responsibility, he was to forward the goods. This guaranty was delivered to Jacobson, and by him delivered to the plaintiff. The plaintiff caused an investigation of the responsibility of the defendants to be made, and notified Jacobson that he was satisfied with the guaranty, but did not notify the defendants. The plaintiff sold goods to Jacobson under the guaranty. May 8, 1895, Boulsom notified the plaintiff that he withdrew from the bond. This notification was in writing, and it was forwarded in a letter written by Mr. Edgerton, who was then acting as attorney for Boulsom. On the 14th of May the plaintiff wrote Mr. Edgerton, saying:

"Yours, with letter of A. Boulsom, received. Bond security of his on J. Jacobson will hold good on all transactions of Jacobson's before bond is withdrawn. Same will be noted."

Edgerton handed this letter to Boulsom upon its receipt. At this time there was due the plaintiff the sum of $207.24. Plaintiff did not notify defendants of this amount until some time in October, when suit was brought to recover this balance.

It is claimed by the defense: *First*, that defendants were never notified by plaintiff that he accepted them as guarantors; *second*, that the balance of $207.24 was paid by subsequent payments made by Jacobson; *third*, that the defendants were not notified in reasonable time of the default of Jacobson.

The circuit judge held that the defendants were entitled to notice of their acceptance as guarantors, before the plaintiff could hold them liable. In support of his contention that the court erred in taking the case from the jury, the appellant relies upon *Farmers', etc., Bank* v. *Kercheval*, 2 Mich. 504, and *Roberts* v. *Hawkins*, 70 Mich. 566, and also cites a number of authorities from other States. All of these have been examined, but we shall refer only to the Michigan cases. In both the Mich-

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igan cases the guaranty was delivered by the guarantor directly to the party extending the credit. In the former case the guaranty was in the form of a bond under seal, in which the amount of the liability and the time it was to run were stated, and it was accepted by the bank on its delivery. In the case of *Roberts* v. *Hawkins*, *supra*, the obligation was the guaranty of the payment of a note, indorsed on the back of the note itself, which note was payable to the plaintiff, and was delivered to her for the express purpose of procuring from her the $1,000, which she paid upon its delivery to her. The guaranty of payment was part of the contract which induced her to part with her money at the time the contract was made. The undertaking of the defendants was quite different from that of the defendant in either of the above-cited cases.

In *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524, the rule is stated by Justice Gray, as follows:

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." 9 Am. & Eng. Enc. Law, 78.

A standard text writer has said:

"A question often arising upon commercial guaranties is whether, in order to charge the guarantor, it is necessary that he be notified of the acceptance of the guaranty by the person acting upon it. When the guaranty is a letter of credit, or is an offer to become responsible for a credit

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which may or may not be given to another, at the option of the party to whom the application for credit is made, the great weight of authority is that the guarantor must, within a reasonable time, be notified of the acceptance of the guaranty. The most satisfactory reasons exist for these decisions. It is of the highest importance to the person thus offering his credit that he should know he is to be looked to for payment. Knowing that fact, he can regulate his dealings with his principal accordingly. He will have an opportunity to secure himself and guard against loss. Concerning this subject it has been said: 'It would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it.' Another reason much relied upon by the courts is that the transaction only amounts to an offer to guarantee until the party making the offer is notified of its acceptance, when the minds of the parties meet and the contract is completed." Brandt, Sur. § 186; *Craft* v. *Isham*, 13 Conn. 28; *Winnebago Paper Mills* v. *Travis*, 56 Minn. 480; *Gardner* v. *Lloyd*, 110 Pa. St. 278.

In the case at bar, the guaranty was not signed by the guarantors at the request of the plaintiff. No consideration passed from the plaintiff to the guarantors, or was acknowledged in the guaranty. It was not accepted by the plaintiff at the time it was given, and he did not agree to accept it until he had satisfied himself of the responsibility of the guarantors, which he proceeded to do some days afterwards by correspondence with the register of deeds. Under such circumstances the guarantors were entitled to know that their guaranty had been accepted, before they were bound.

Judgment is affirmed.

The other Justices concurred.

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## SCHOEPPER *v.* HANCOCK CHEMICAL CO.

1. PERSONAL INJURIES—UNKNOWN CAUSE—BALANCING OF PROBABILITIES.

   The rule that where an injury occurs that cannot be accounted for, and the occasion of it rests wholly in conjecture, the case may fail for want of proof, will not be extended so as to deny a right of action to an injured person where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon his theory than upon that of the defense.

2. SAME — EXPLOSION OF NITROGLYCERINE — EVIDENCE — QUESTION FOR JURY.

   Whether the inference suggested by plaintiff's theory as to the cause of an explosion of nitroglycerine, whereby her intestate had been killed, was the correct one, or whether it was sufficiently rebutted, was a question for the jury, upon evidence that the explosion occurred a few hours after an attempt had been made to change the method of conveying the compound, by employing for the purpose a rubber hose; that, upon its appearing that the plan was impracticable, the hose had been permitted to remain attached at one end to a tank, and filled with so much of the compound as failed to escape at the open end; and that the compound contained acids which would generate gases and cause an explosion; and evidence in rebuttal that nitroglycerine explodes at 380 deg. Fahrenheit, and that hose of the size employed would not stand the pressure occasioned by the generation of that degree of heat.[1]

Error to Houghton; Hubbell, J. Submitted April 16, 1897. Decided July 13, 1897.

Case by Augusta Schoepper, administratrix of the estate of Fred Schoepper, deceased, against the Hancock Chemical Company, for the alleged negligent killing of plaintiff's intestate. From a judgment for defendant on

[1] Negligence in the manufacture and storage of explosives is the subject of a note to *Judson* v. *Giant Powder Co.*, (Cal.) 29 L. R. A. 718.

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verdict directed by the court, plaintiff brings error. Reversed.

*J. F. Hambitzer* and *Ball & Ball*, for appellant.

*A. R. Gray* (*C. R. Brown*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff's intestate met his death while in the defendant's employ, and the question involved in this case is whether his death was caused by actionable negligence of the defendant. The defendant is engaged in the manufacture of nitroglycerine in the county of Houghton, and, prior to the injury complained of in this suit, had been engaged in that business for 10 or 12 years. The method of manufacturing nitroglycerine at the defendant's works is as follows: 1,200 pounds of sulphuric acid is first mixed with 1,650 pounds of nitric acid, after which 1,700 pounds more of sulphuric acid is added, and all is mixed up in a tank called the "agitator." The agitator is an iron tank having about it a water jacket, through which cool water is caused to flow continually while the mixing process is going on, in order to keep down the temperature. After mixing the acids, the oil, or sweet glycerine, is run in slowly, and cold water kept running through the water jacket, so as to keep the temperature down; otherwise, it is liable to explode during the process of manufacture. It is considered necessary to keep the temperature down to about 80 deg. Fahrenheit. In this manner about 515 to 545 pounds of glycerine is introduced into, and chemically combined with, the quantity of nitric acid above mentioned. After mixing, the compound is allowed to stand and settle from one to two hours. The nitroglycerine, being lighter than the acids, rises to the top as it forms. Only about 70 per cent., or less, of the nitric acid, has combined with the glycerine; about 15 per cent. remains mixed with the glycerine, but not chemically combined; and the remainder passes off in fumes. The sulphuric acid and whatever of the nitric acid is not mixed with the glycerine settles to

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the bottom of the agitator, being heavier than the nitroglycerine. The sulphuric acid, being heavier than either, is at the bottom. None of the sulphuric acid combines with the glycerine, and does not enter into the composition of nitroglycerine. It is used because of its strong affinity for water, and it absorbs or takes up the water that is formed by chemical action in the combination of the nitric acid with the glycerine. After the mixture has settled, the sulphuric acid is drawn off through a pipe to tanks some distance away, called "settlers." In these settlers the nitroglycerine which becomes mixed with the sulphuric acid rises to the top, and is skimmed off, and washed like the other nitroglycerine, and the sulphuric acid is saved for another process. After the sulphuric acid, or most of it, is drawn out from under the nitroglycerine, the glycerine, together with the nitric acid mingled with it, and whatever of sulphuric acid remains, is drawn through a 2-inch pipe into a tank of water about 5½ feet deep, called the "drowning tank." The specific gravity of nitroglycerine is about 1 6-10, and, with whatever of nitric or sulphuric acid is mixed with it, it sinks directly to the bottom of the drowning tank. The drowning tank is not stirred or agitated except by a stream of water running into it from the cold-water jacket, which runs in part of the time while the nitroglycerine is falling into and lies in the drowning tank. The substance that goes into the drowning tank is mainly nitroglycerine, but has mixed with it a quantity of free nitric acid and some sulphuric acid. Immediately after the mixture is dumped into the drowning tank, they commence to draw it off into pails, and carry it to the wash-house, about 200 feet distant, where it is washed in two or three waters, and finally in soda water, until the acid is entirely eliminated or neutralized. The bottom of the drowning tank has a slope of 10 inches towards the faucet where the nitroglycerine is drawn out into pails, and also towards the faucet where an attempt was made to draw it out through a hose.

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On the 16th of May, 1895, the defendant endeavored to change the method of conveying the nitroglycerine from the drowning tank to the wash-house, or vault, as it is called. A rubber hose three-quarters of an inch in diameter was procured, and laid so as to run on a level from a faucet in the drowning tank to the vault, a distance of about 200 feet. The hose had a drop of about 5 or 6 feet in the vault, so as to convey the glycerine into the bucket or other receptacle. Between 9 and 10 o'clock (the superintendent says half past 10) the faucet was opened, and the glycerine started to run. At first, for a few minutes, it ran somewhat freely, but very soon it began to run very slowly, and only drizzled. After trying about 15 minutes to run the glycerine through the hose, it was given up; and, by orders of the superintendent, the faucet at the drowning tank was closed, and the nitroglycerine immediately stopped running out of the hose. During this time only one, or, at most, two, pails of the compound had run through the hose. The employés were at once set to work carrying the nitroglycerine in pails, as they had done before; but the hose remained attached to the faucet at the drowning tank, and very little, if any, of the nitroglycerine that was in it, ran out. The hose lay in that condition, containing so much of the nitroglycerine as had not run out, until about 20 minutes after 1 o'clock in the afternoon, at which time the nitroglycerine remaining in the hose, and about 1,200 pounds more, stored in the vault or wash-house, exploded, and Fred Schoepper was thereby killed. The negligence imputed to defendant was the use of this hose in the manner in which it was used, and permitting the compound to remain in the hose until, by chemical action of the ingredients, an explosion occurred, which resulted in the death of the plaintiff's intestate.

At the conclusion of the evidence, the learned circuit judge directed a verdict for defendant, on the ground that the plaintiff had not shown that the explosion was caused in the manner indicated in the declaration. This is the

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only question that need be considered, for, while the defendant makes the point that the plaintiff failed to show that the deceased was not guilty of contributory negligence, it is enough to say that, in addition to the presumption of due care which obtains in cases of death resulting from an injury, it is plainly apparent that deceased had nothing whatever to do with the work of running this compound through the hose in question, and was in no way responsible for its being left there; and it follows that, if the explosion was caused by these acts of defendant, the deceased in no way contributed to the result.

Defendant's counsel contend that the cause of this explosion is a matter of mere conjecture, and it is said by counsel that it is not enough for plaintiff to prove circumstances consistent with her theory, but that these circumstances, and each of them, must preclude any other rational conclusion. This we take to be but another way of stating the proposition that the proof must exclude all reasonable doubt. It is hardly necessary to say that no such rule obtains in civil cases. It is true that where an injury occurs that cannot be accounted for, and where the occasion of it rests wholly in conjecture, the case may fail for want of proof. *Robinson* v. *Charles Wright & Co.*, 94 Mich. 283; *Redmond* v. *Lumber Co.*, 96 Mich. 545. But such cases are rare, and that rule should never be so extended as to result in a failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon one side than the other. In this case there was no direct proof of any other probable producing cause of the explosion than such as was offered by the plaintiff.

It is true that defendant offered testimony to the effect that washing the nitroglycerine with very hot soda would be dangerous. But there was no evidence that deceased was engaged in washing this nitroglycerine in hot soda. It is true, one witness swears that on one occasion he was in the vault when the soda water that Schoepper was

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going to use was too hot. He testifies that he told Schoepper that it was too hot, and that Schoepper replied, "Let it stand awhile, and it will cool off." Another witness gave similar testimony. But this does not show (certainly not conclusively) that on the day in question deceased was using soda water which was too hot. It was further in evidence that deceased had been known to drive a wooden faucet into a nitroglycerine barrel, and there is testimony that under certain conditions, if foreign substances were present, this might cause an explosion. But it further appeared that deceased had been told not to do this, and, since being so instructed, had not been known to do it. On the other hand, the testimony on the part of the plaintiff (and, in determining this case, the question must be whether the testimony of plaintiff was sufficient to make a *prima facie* case for the jury) was, in addition to the facts above stated, furnished by an expert witness, one Dr. Wheeler, and by a Mr. Johnson, who had had practical experience in the manufacture of nitroglycerine. Dr. Wheeler testified that, from his experience, he would not consider it safe to permit the compound to remain in the hose in the manner in which it was for the length of time that it was permitted to remain there; that the result would be that gases would form, and that it would be dangerous,—would result in an explosion,—and that he would not consider it safe to leave it there in that condition at all, unless it was running. He also testified that, when this compound leaves the drowning tank, the percentage of free acid is about 5 or 6 per cent.; that, the greater the per cent. of acid, the more dangerous it would be, but that any amount of free nitric acid in a compound is dangerous if the compound is stationary, and not running a steady stream, even 1 per cent.; that he would consider it dangerous to leave this compound, as it leaves the drowning tank, in a rubber hose 150 feet long, any length of time without running. "I wouldn't want to experiment by leaving it there three hours, and I would consider it dangerous if it was unwashed nitroglycerine,

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containing 1 per cent. or more nitrous acid, because the gases would form there, and their pressure would cause an explosion."

It is true that defendant's testimony would tend to show that the pressure upon the hose, before the heat was generated sufficient to cause an explosion, would be greater than the hose would bear, and that the degree of heat necessary to cause an explosion is supposed to be 380 deg. Fahrenheit, while the hose would stand no such pressure; and it is argued from this, as well as from the fact that the hose was open at one end, that, before the degree of heat that was necessary to cause an explosion could be generated, the compound would escape. But Dr. Wheeler testified that it might not escape at the open end of the hose, and that, with one end of the hose open, he would still consider it dangerous; and, further, that, if the hose was closed at both ends, a pressure sufficient to explode the pipe would probably explode the nitroglycerine. And he further testified that if the hose described was open, and a pressure of something like 500 gallons of water on one end of it, and the pressure was not sufficient to force the mixture through the hose, this would indicate that there must have been some obstruction; and, further, that he didn't think that it was necessary, in order that nitroglycerine should explode, that the vessel should stand 375 pounds pressure to the square inch; that he didn't think that it would be necessary to have anything stand such pressure to explode it. One William A. Dunn, who had had practical experience with nitroglycerine containing free acids, testified to actual explosions which had taken place of the material in square tin cans, of ordinary sheet tin, and testified that such explosions occurred even though the cans would stand very little pressure, as there was simply a cork put into them, and any small pressure would blow out the cork.

It is true, defendant's theory and expert testimony is opposed to that offered by the plaintiff. It is the peculiar province of the jury to weigh this testimony. If the

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testimony offered in behalf of the plaintiff is credited, we have a case in which, on the first occasion on which an attempt was made to use this hose in the manner in which it was used, an explosion followed upon such a use of the hose as experience teaches is careless and unsafe. Under such circumstances, we think the question of what was the cause of this injury was one for the jury. Negligence, like any other fact, may be inferred from circumstances. *Alpern* v. *Churchill*, 53 Mich. 613; *Barnowsky* v. *Helson*, 89 Mich. 523. And, though the proof of plaintiff depended upon inference to establish the main fact, the question of whether the inference suggested by the plaintiff's theory is the correct one, or whether it was sufficiently rebutted, was for the jury. *Crosby* v. *Railway Co.*, 58 Mich. 458; *Hagan* v. *Railroad Co.*, 86 Mich. 615; *Woods* v. *Railway Co.*, 108 Mich. 396.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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## GRATOPP *v.* VAN EPS.

JUSTICES OF THE PEACE — ABOLISHMENT OF OFFICE — CONSTITUTIONAL LAW.

A justice of the peace in a city cannot be legislated out of office before the expiration of the term for which he was elected under article 6, § 17, of the Constitution, by an act reincorporating the city, and reducing the number of justices therein.

*Mandamus* by Frederick Gratopp to compel Arthur E. Van Eps, a justice of the peace, to issue an execution. Submitted May 4, 1897. Writ granted July 13, 1897.

The relator obtained a judgment under one Salisbury, a justice of the peace of the city of Mt. Clemens, in August, 1894. At the spring election of 1895 the respondent was elected the successor of said Salisbury. The city at that time had four justices of the peace, the respondent being elected for a full term. The city of Mt. Clemens was reincorported under Act No. 215, Pub. Acts 1895; the reincorporation taking effect January 1, 1896. In the reincorporation only two justices were provided. Two justices were elected, qualified, and entered upon the discharge of their duties. The respondent refused to turn his books and records over as the law requires a justice to do when his office is vacated, and also refused to issue an execution to the relator. The reason for his action is his doubt as to his tenure of office. The purpose of this proceeding is to settle that question.

*Byron R. Erskine*, for relator.

*Fred A. Maynard*, Attorney General, for respondent.

GRANT, J. (*after stating the facts*). A justice of the peace is a constitutional officer. The Constitution provides

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that he shall be elected, and shall hold his office for four years, and until his successor is elected and qualified. Const. art. 6, § 17; *Brooks* v. *Hydorn*, 76 Mich. 273. The legislature cannot deprive constitutional officers of the powers and duties conferred upon them by the Constitution. *Averill* v. *Perrott*, 74 Mich. 296. It appears to be well settled that, where the term of office of a constitutional officer is fixed by the Constitution, the legislature cannot remove him by abolishing the office, unless the power so to do is expressly given by the Constitution. *People* v. *Garey*, 6 Cow. 642; *Garey* v. *People*, 9 Cow. 640; *State* v. *Friedley*, 135 Ind. 119; *Foster* v. *Jones*, 79 Va. 642 (52 Am. Rep. 637); *King* v. *Hunter*, 65 N. C. 603 (6 Am. Rep. 754); *People* v. *Bull*, 46 N. Y. 57 (7 Am. Rep. 302); 19 Am. & Eng. Enc. Law, 562*m*. We are not dealing with a case where the officers of a municipality have been legislated out of office by the repeal of its charter and the destruction of its identity, but with a case where the name, identity, and territorial limits remain the same. In the latter case the charter has simply been reorganized or amended, but no jurisdiction destroyed. In such case constitutional officers whose terms are fixed by that instrument cannot be legislated out of office by such reorganization or amendment. The respondent having been elected for a full term, the act of reincorporation of the city did not operate to legislate him out of office. He should therefore have proceeded to issue the writ of execution.

The writ of *mandamus* will issue accordingly.

The other Justices concurred.

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*In re* SCHULZ'S ESTATE.

WILLS—WIDOW'S ELECTION—DISTRIBUTION OF ESTATE.

A testator bequeathed to his wife all of his household goods, and gave her a life estate in the residue of his property, real and personal. Specific bequests were made to five persons, who were also made residuary legatees in proportion to the sums bequeathed to them. It was further provided that, if any of said legatees should be dead at the time of the decease of the wife, the heirs of such deceased legatee should take the legacy bequeathed to him. The widow elected to take under the law, and not under the will. *Held*, that the legatees were entitled to an immediate distribution of the estate.

Case made from Wayne; Adams, J., presiding. Submitted June 8, 1897. Decided July 13, 1897.

The petition of a legatee under the will of Martin F. Schulz, deceased, for the distribution of the estate, was granted by the probate court, and Herman Kleinow, administrator with the will annexed, appealed to the circuit court. The order of the probate court was reversed in the circuit, and the legatees assign error. Reversed.

Martin F. Schulz died testate. By his will he bequeathed his household goods to his wife, and all the rest and residue of his estate, both real and personal, to his said wife for life. By the third clause he provided that his executor should, as soon as convenient after the decease of his wife, sell and convey all his real estate for the purpose of paying expenses and "the legacies hereinafter bequeathed by me." By the fourth clause he bequeathed certain amounts to five persons, and by the fifth clause made these five persons the residuary legatees in proportion to the sums bequeathed to them. By the sixth clause he provided that, if any of the said legatees be dead at the time of the decease of his wife, the heirs of said deceased

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legatee should take the legacy bequeathed to him or her. The widow elected to take under the law, and not under the will. Dower was assigned to her. The real estate was sold by the administrator with the will annexed, under the order of the probate court; and, after paying the debts and the widow's portion, there remained in his hands about $2,500. The administrator made report to the probate court, and asked for an order of distribution under the terms of the will, if the legatees were entitled thereto. One of the legatees also petitioned for such distribution. The probate court directed the distribution of the estate. Upon appeal to the circuit court this order was reversed, and it was held that the estate could not be distributed until after the death of the widow.

*William E. Henze*, for appellants.

*Morse Rohnert*, for appellee.

GRANT, J. (*after stating the facts*). The judgment of the circuit court was wrong. The clear intent of the will was to secure to the widow the use of the entire estate for life, and that upon the termination of the life estate the legatees mentioned in the fourth and fifth clauses should take. The life estate in the widow was as effectually terminated by her election as it could be by her death. The will makes no provision for the care and control of the estate in the event that the life estate should be terminated by the election of the widow. It is conceded that, but for the sixth clause, the legatees named in the fourth clause would be entitled to receive their legacies at once. But it is insisted that the right to receive is limited upon the death of the wife. The clear intent of the testator was to create a life estate, and it probably never occurred to him that his wife would take under the statute, and thus terminate such estate. It is equally clear that he intended that upon the termination of that estate his property should be distributed at once to his legatees. *In re Woodburn's Estate*, 151 Pa. St. 586;



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*Coover's Appeal*, 74 Pa. St. 143; *Small* v. *Marburg*, 77 Md. 11. *Dean* v. *Mumford*, 102 Mich. 510, has no application to this case.

Judgment reversed, and the case remanded to the probate court of Wayne county for further proceedings in accordance with this opinion.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## RATHBUN *v.* PARKER.

1. PLEADINGS AND PROOFS—AMENDMENT TO DECLARATION.
   Plaintiff in an action to recover damages for fraudulent representations as to the value of a patent right was properly permitted to amend his declaration, after the testimony was closed and arguments had, to meet the proof in respect to a particular false representation to the effect that a certain prominent and wealthy person had purchased a small amount of territory for a large price. GRANT, J., dissenting.

2. TRIAL—VERDICT—SPECIAL QUESTIONS.
   A general verdict should not be received without compelling an answer to special questions, involving important and material testimony.

Error to Shiawassee; Wisner, J., presiding. Submitted June 9, 1897. Decided July 13, 1897.

Case by Bethuel D. Rathbun against George A. Parker for fraudulent representations. From a judgment for plaintiff, defendant brings error. Reversed.

We are favored with no brief on the part of the appellee. We must therefore assume that he is content with the statement of facts made in the appellant's brief, which we adopt:

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"'Plaintiff, in the fall of 1892, was the owner of a small store in the village of Bancroft, Shiawassee county, Michigan. The defendant at that time lived on a farm near the village of Bancroft, was postmaster and justice of the peace, and also was buying potatoes in the village of Bancroft, and selling them in the city of Detroit. The 25th of November, 1892, the defendant was in Detroit, and stopped at Rice's Hotel, where he casually met one O. F. June. June was showing a patent window screen patented by one S. U. Tierney, and gave defendant some circulars describing the patent. That evening, after Parker arrived home, and while in the post-office, he was showing the circular to some mechanics and other citizens of Bancroft, when plaintiff came in, and took part in the conversation, borrowed a circular, and took it home with him. Plaintiff wrote June the next day the following letter:

"'"BANCROFT, MICH., Nov. 26, 1892.

"'"MR. O. F. JUNE, Esq.

"'"*Respected Sir:* Mr. George Parker, of this town, has called my attention to Tierney novelty window screen, and tells me that you are desirous of selling territory. From what I see of it and am able to judge from the cut, I am quite favorably impressed with it, and shall be pleased to hear from you further. I have a grocery stock and shoe shop in my place here, which I inventoried at nearly $4,000, which I would like to turn into some such enterprise. If you can think of entertaining such a proposition, please reply by return mail. Should you have one or more States entire left, I desire to have you estimate thereon, but more especially the counties near by Bancroft. Please be prompt, and oblige,

"'"Yours respectfully,

"'"B. D. RATHBUN.'

"On the 2d or 3d of the following December, 1892, plaintiff and defendant went to Detroit together, and there met June, and the plaintiff examined the screen. On the 5th of December, 1892, June came to Bancroft to sell them some territory, and there he made a bargain with Rathbun and Parker. He deeded the plaintiff and defendant the entire State of Wisconsin, and all of Michigan, except 16 counties, for which Rathbun gave June a bill of sale of a stock of goods, and Parker claims to have given June a note of $200 against a third party, and two notes of his own, amounting to $800, for his share of the

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patent right. June stayed in Bancroft a week or 10 days, and finally sold the goods to Charles Parker for $800, and then returned again to Detroit. Parker and Rathbun visited some manufacturers in Owosso, Ovid, and some jobbers in Saginaw and Detroit, for the purpose of seeing about selling the screens in case they were manufactured. They bought a few of the castings manufactured, but were unable to get any great quantity at what they considered a fair price. June represented to them that Campau & Fox were going to start a factory in Birmingham, and it would be better to get them there. But this they were unable to do; so they visited Detroit at different times, and went to Monroe, to try and get the castings, and finally they bought 25 pounds at Ft. Wayne, Ind., but they proved to be of a very poor quality, and they failed to find any one who would manufacture the castings. This took them to nearly spring, and Parker claims that they agreed to postpone doing anything further until fall; at least, nothing further was ever done in the way of manufacturing the screens, either by the plaintiff or defendant. In the spring of 1893 defendant went to Chicago, and engaged in a small business there. He took plaintiff's son with him, and took him into his employ, but discharged him after a short time. Soon after his discharge, and on the 22d day of May, 1893, plaintiff commenced this suit against defendant, claiming conspiracy between him and June and Tierney to cheat and defraud him, the said plaintiff. Plaintiff recovered verdict and judgment for $725.61."

The declaration contains two counts. The first alleges that plaintiff exchanged his stock of merchandise with one S. U. Tierney for a deed of letters patent on this screen to himself and defendant, with the right to manufacture it in the States mentioned, in consequence of the false and fraudulent representations by defendant that he, "the said Parker, knew where there was a good and profitable patent window screen, known as the 'novelty screen;' that the patent of the same was very valuable, and all could be readily sold that could be made of said screens; that he (the said Parker) knew this because he had seen them, and had investigated the same; that said patent was worth the sum of $7,000 for the right to man-

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ufacture and sell the same in the States of Wisconsin and Michigan; and that, if he (the said Bethuel Rathbun) would purchase a one-half interest in said patent, he (the said Parker) would purchase the other one-half, and that they would manufacture said screen." The second count alleges a conspiracy between defendant, Tierney, and June upon the same representations as those stated in the first count. Both counts allege that the patent was worthless. The plea was the general issue.

*Selden S. Miner* and *Frank F. Bumps*, for appellant.

*Watson & Chapman*, for appellee.

GRANT, J. (*after stating the facts*). 1. After the testimony was closed and the arguments had, the court permitted the plaintiff to amend his declaration by adding thereto that defendant "represented that Daniel J. Campau, a politician, and chairman of the Democratic State Central Committee, had purchased a small amount of territory for a large price, and had paid therefor $10,000, and that he was a millionaire, and would not have gone into it if it had not been a good thing." I do not think that the original declaration stated a cause of action. The sole representation was as to the value of a patent right, coupled with a promise by defendant to buy a half interest, and to enter with plaintiff into the business of manufacturing. It was a statement of a mere opinion, and the declaration fails to state—what the proof shows—that plaintiff examined the screen before buying, and was as competent to judge of its value as was the defendant. Defendant was entitled to know before proceeding to trial what the representations were upon which he was to be held liable for the value of plaintiff's goods, none of which he had received, and from the sale of which he had derived no benefit. The learned circuit judge allowed the amendment upon the theory that the record disclosed that all those who were shown to have heard the representations had been witnesses in the case. The question

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was raised as to the competency of this testimony under the original declaration when the first witness was upon the stand. Plaintiff did not then ask to amend, but waited until the court was proceeding to instruct the jury. I do not think the amendment should have been permitted at this stage of the case.

2. Two special questions were submitted to the jury: (1) "Did Parker give any valuable consideration for his share of the patent, and did it equal the amount paid by Rathbun?" To this question 10 jurors voted "No," and it does not appear that the other two jurors voted. (2) "If you answer 'Yes' to this question, did Parker get it back again, or any part thereof, without paying for it?" To this one juror voted "Yes," and one voted that Parker paid $700 for his two notes of $400 each. It does not appear how the other 10 voted. No objection was made to the submission of these questions. They bore upon the good faith of defendant. It would be difficult to understand how a jury would find defendant liable if he fulfilled his agreement with plaintiff, and paid his full share of the purchase price. Men are not in the habit of making false and fraudulent representations for the purpose of defrauding their neighbors without receiving a consideration. The testimony presents some very peculiar features, not necessary to note, and these questions involve very important and material testimony. It was error to receive a general verdict without compelling an answer to these special questions.

3. When the defendant was testifying, counsel for the plaintiff objected to a question, in the following language: "Objected to. They must first show that the man has a conscience." Since the case must be reversed for other reasons, we refrain from commenting upon this language. Its use is not likely to occur upon a new trial. *Carter* v. *Hill*, 81 Mich. 280; *Sullivan* v. *Deiter*, 86 Mich. 404; *Clink* v. *Gunn*, 90 Mich. 140.

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Several questions are raised upon the admission and rejection of testimony, but it is not necessary to discuss them.

Judgment reversed, and a new trial ordered.

MONTGOMERY, J. I concur in the result, but do not think the amendment to the declaration was error.

LONG, C. J., and MOORE, J., concurred with MONTGOMERY, J. HOOKER, J., did not sit.

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## HOUGHTON v. BRADLEY.

CONTRACTS—INSURANCE—AGENT'S COMMISSIONS—CUSTOM.

A custom in the life-insurance business to allow general agents a permanent interest in the insurance secured by them in the form of a percentage on the renewal premiums does not affect or modify the provision of a contract which expressly limits commissions on business secured by the agent to the continuance of the agency.

Cross-appeals from Wayne; Adams, J., presiding. Submitted June 9, 1897. Decided July 13, 1897.

Bill by Spencer L. Houghton against Alonzo E. Bradley and the State Mutual Life Assurance Company for a partnership accounting. From the decree rendered, all parties appeal. Reversed.

*Jasper C. Gates*, for complainant.

*George W. Radford*, for defendants.

GRANT, J. The issues involved in this case are succinctly stated in 110 Mich. 308. The case was then before us on demurrer to the bill. The defendants

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answered, proofs were taken in open court, and decree entered for the complainant against the defendant Bradley for $1,338.95. The court found that the defendants terminated the agency of complainant arbitrarily and without just cause, and that complainant is entitled to future renewal commissions upon all premiums which fell due before July 1, 1897. It was decided in the former opinion that complainant and Bradley were partners. No period of duration was fixed in the articles of copartnership. It was conceded upon the hearing below that either party could terminate the partnership at will. It appears therefore to be immaterial, in the determination of the question involved, whether the partnership was terminated with or without just cause. If it were material to decide that question, we should reach a different conclusion from that found by the learned circuit judge.

For some reason, which we need not consider, complainant, for about two years before his discharge, had been a failure as an insurance solicitor. During the last six months of 1894 he had secured only $14,000 insurance, and in one month (August) did not secure a single policy. During the same time another solicitor, named Van Tuyl, had secured $149,000. During the first five months of 1895 complainant's record is as follows: January, nothing; February, $1,000; March, $4,000; April, $3,000; May, nothing. During these same months Mr. Van Tuyl had secured as follows: January, $19,500; February, $15,000; March, $27,000; April, nothing; May, $33,500. And during these same months Mr. Bradley, who had the general charge of the office, wrote $40,000. It is difficult to understand why this record was not sufficient to justify both the defendants in discharging complainant from their employ. If this were so, his right to the renewal commissions would have ceased with his discharge. *Phœnix Mut. Life Ins. Co.* v. *Holloway*, 51 Conn. 310.

Complainant commenced to work for Bradley July 7, 1890, in the interests of the company, under a written contract, by which he agreed to work for one year from

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July 7th. Bradley guaranteed commissions to be at least $50 a month and traveling expenses. Before January 1st following, he secured about $100,000 insurance. There was a verbal understanding that, if complainant were successful as a solicitor, some other arrangement should be entered into. His success was deemed sufficient to justfy entering into the contemplated agreement. Thereupon Bradley, on December 9, 1890, wrote to the company the letter found in paragraph 2 of the former opinion. In that letter was this significant and unequivocal language:

"I have made arrangements with him [Houghton] to give him one-half interest in the renewals on all business secured after January 1, 1891, *as long as he remains with the company*, under the firm name of 'Bradley & Houghton, General Agents.'"

Complainant read this letter before it was sent, and was fully aware of its contents. In the reply by the company, set forth in paragraph 3 of the former opinion, it said:

"We note that on and after January 1, 1891, you have agreed to give him one-half interest in all the renewals on all business secured after said date, *as long as he continues with the company.*"

The company assented to the agreement. This letter was also read and its contents understood by complainant. Complainant and Bradley then made the agreement found in paragraph 4 of the former opinion. That agreement contained the following language:

"I [Bradley] agree to give him [Houghton] one-half of the renewal commissions on all new business secured and placed on the books of this agency from and after January 1, 1891, *as long as he remains with this agency;* also, the full first year's commission on all business secured by him."

The bill was evidently drafted in recognition of the force and meaning of the unequivocal language of the agreement, and sought to avoid its effect by alleging that there

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was a "custom of the business of life insurance, as between life-insurance companies and their general agents, that such general agents have a permanent interest in the insurance secured by such agents, which interest is in the form of a percentage of the renewal premiums on the policies which represent such insurance, which interest is called 'renewal commissions,'" and that said agreement was entered into "under and with reference to said custom and such usage." Complainant entered upon his proofs upon this theory, and his first witnesses were several general agents of other companies, introduced in the attempt to establish this custom. The testimony failed to show any such custom or usage, and the court so found. If, however, such a custom were proven, it would not avoid the plain terms of the contract. *Stagg* v. *Insurance Co.*, 10 Wall. 589; *Iron Duke Mine* v. *Braastad*, 112 Mich. 79. The language of this contract cannot be construed as giving complainant a permanent interest in these renewals, without doing violence to the common rules of construction. In fact, the language is so plain that it leaves no room for construction. Twice, in the letters written before the contract was made, the same language was used, and was read by and known to the complainant. In *Stagg* v. *Insurance Co.*, *supra*, plaintiff's contract read as follows: "For your services as above, you will be allowed a commission of 10 per cent. on the first premiums (cash and notes), and 5 per cent. on all subsequent renewal premiums, *so long as you continue the agent of the company.*" It was held that his right to the commissions ceased with the termination of his agency. See, also, *North Carolina, etc., Ins. Co.* v. *Williams*, 91 N. C. 69 (49 Am. Rep. 637); *Spaulding* v. *Insurance Co.*, 61 Me. 329. No other case better illustrates the wisdom of the rule that parties are bound by the plain terms of their contract, and cannot change them by parol testimony of a different one. The parties have agreed in writing, and in language susceptible of but one meaning, that complainant's right to renewal commissions is limited

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to his term of service. It is sought to introduce into the contract, by parol, another provision, extending this right beyond the term of service. Upon this, the testimony is in direct conflict.

This disposes of the only question in the case which we think important to consider. Complainant was only entitled to the renewals up to the time of the dissolution of the partnership, which included what is known as "purchased insurance," to the purchase of which he contributed.

The decree will be reversed, and the case remanded to the court below for an accounting and decree in accordance with this opinion. The defendants will recover the costs of this court.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## SWANSON v. MENOMINEE ELECTRIC LIGHT, RAILWAY & POWER CO.

1. TRIAL—PLEADINGS—SPECIAL QUESTIONS—HARMLESS ERROR.
   A special finding by the jury that a certain wire, with respect to the maintenance of which an electric light company was alleged to have been negligent, was a dead wire, as set forth in the declaration, cures any error in the submission of the case upon the theory that it was immaterial whether the wire in question was a dead or a live one.

2. NEGLIGENCE—EVIDENCE—NOTICE—QUESTION FOR JURY.
   The question whether an electric light company could have known, by the exercise of reasonable skill, that attaching a bracket and wire to a brick cornice would subject it to a strain which, by reason of its frail construction, would render it liable to fall and injure pedestrians, was for the jury, upon evidence that the building was brick-veneered, that it had been built 22 years, that the front was cracked, and that it was otherwise in bad condition.

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Error to Menominee; Stone, J. Submitted June 10, 1897. Decided July 13, 1897.

Case by Ada C. Swanson, administratrix of the estate of J. Sanfred Swanson, deceased, against the Menominee Electric Light, Railway & Power Company, for negligently causing the death of plaintiff's intestate. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff's intestate, while walking along the sidewalk of Main street, in the city of Menominee, was killed by the falling of a brick cornice from a two-story building known as "Nos. 416 and 418," and belonging to one Bertholdt. Plaintiff charges that the accident was due to the negligence of the defendant. The declaration alleges that the defendant "carelessly and negligently maintained and continued to maintain in, along, and across said Main street and the sidewalk a heavy wire reaching from one of its poles to said building at or near the cornice on the front portion of the same, to which it was attached by a bracket or cleat, but not for conducting electricity into the building, and therefrom extending diagonally across said street to a standing post surmounted with a large number of cross-arms and wires strung thereon, to which said standing post said wire was there attached." It is then alleged that the cornice was frail, and liable to break and fall if subjected to a severe or constant strain, and that it was subjected to such strain on account of this wire, which was swayed to and fro by the winds, and by its expansion and contraction, and by the ice and snow collecting upon it. It is unnecessary to state the other averments of the declaration. Plaintiff had verdict and judgment.

*Sawyer & Waite* (*B. J. Brown*, of counsel), for appellant.

*Charles Line* (*H. O. Fairchild*, of counsel), for appellee.

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GRANT, J. (*after stating the facts*). 1. It is first urged on behalf of defendant that the declaration counts only upon a dead wire,—that is, one not used for conducting electricity,—and that the court erred in submitting to the jury the question of negligence in placing and maintaining this wire if it was a live one. This question becomes immaterial in view of the special finding of the jury upon a question submitted to them at the request of the defendant. *Question:* "Was this wire that was fastened to the Bertholdt cornice used for the purpose of conducting electricity into the Bertholdt building at the time of this accident?" To this question the jury answered "No." They therefore found it was a dead wire. It follows that, if any error was committed, it was one without prejudice. *Russell* v. *Insurance Co.*, 80 Mich. 407; *Cook* v. *Canny*, 96 Mich. 398.

2. Error is assigned upon the refusal of the court to direct a verdict for the defendant. This contention is based upon the claim that there is no tangible evidence upon the record that the defendant maintained a wire running from the pole in the street near the Bertholdt building to the bracket at or near the cornice. The claim of the defendant was that a wire ran along in front of the buildings to convey the electricity into them, and that no wire extended as claimed by the plaintiff. We think there was testimony to sustain both theories, and that the determination of the question belonged to the jury. There is direct and positive evidence to sustain the plaintiff's allegation in this regard. The ordinance under which defendant was operating provides that it "shall not run its wires over or upon any building within said city except as may be essential for conducting electricity therein for lighting purposes." The attaching of this dead wire was, therefore, in direct violation of the city ordinance. But, aside from the ordinance, it was negligence to attach the wire to the cornice if the danger was apparent.

3. It is urged that there is "no evidence to show that the defendant could, by the exercise of reasonable skill,

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have known that there was any danger at the place of the accident." Defendant's employés attached the bracket and wire to this cornice. The building was brick-veneered. It had been built 22 years. The front was cracked. It was otherwise in bad condition. The defendant, through its employés, is chargeable with notice of apparent defects. There was sufficient evidence upon this point to submit the question to the jury.

4. Several errors are assigned upon the admission and rejection of testimony. We find no material error committed, and we do not think the points raised are of sufficient importance to be discussed. The same remark is applicable to the errors assigned to the charge of the court. The case was fairly submitted to the jury under proper instructions.

The judgment is affirmed.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## *In re* KING'S ESTATE.

1. EXECUTORS AND ADMINISTRATORS—EXTRAORDINARY SERVICES—EXTRA COMPENSATION.

   The case is one of "unusual difficulty," within the meaning of 2 How. Stat. § 9015, providing for an extra allowance to executors in cases of unusual difficulty or responsibility, in which the executor is obliged to perform services not required of an executor in the ordinary course of his employment.

2. SAME—DEFENSE OF WILL—PROCURING WITNESSES.

   Services rendered by an executor in hunting up witnesses for proponents upon a contest of the will, in bringing them to counsel, and in assuming the responsibility of procuring their attendance at court, may properly be classed as extraordinary.

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3. SAME—AMOUNT ALLOWED—DISCRETION OF COURT.
The amount of an allowance for extraordinary services is discretionary with the trial judge, if there is evidence to support the claim.

Error to Wayne; Haire, J., presiding. Submitted June 8, 1897. Decided July 13, 1897.

Rachel L. Doty appealed from an order of the probate court disallowing her claim for services as executrix of the last will and testament of Adeline King, deceased. From a judgment for claimant, the estate (represented by George W. Bates) brings error. Affirmed.

*Otto Kirchner*, for appellant.

*Ervin Palmer*, for appellee.

MONTGOMERY, J. This is an appeal from an allowance of compensation to claimant as executrix of the will of Adeline King. The circuit judge made a finding of facts, among which are the following:

"That from and after June 20, 1892, said Rachel L. Doty, as executrix, performed extraordinary services, not required of an executor or administrator in the common course of his duty, in hunting up witnesses for proponents, and bringing them to counsel, and in talking with a large number of persons with a view of making them witnesses for proponents, and assuming the responsibility of procuring the attendance of said witnesses for proponents, and having them present in court when needed, and in bringing them to counsel for proponents for examination; that said Rachel L. Doty was engaged in performing said extraordinary services for the estate the most of the time from June 23, 1892, the date of the sale of her said interest, to the close of the second trial; and said extraordinary services, and the responsibilities imposed upon her as executrix, were worth the sum of $1,500."

As a conclusion of law the court found:

"That, in exercising the judicial discretion imposed upon him by statute, it is just and reasonable that the said

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Rachel L. Doty be allowed for her said extraordinary services and responsibility the sum of $1,500 and costs of this suit, to be taxed."

This matter was before the court on an appeal by claimant at a former term, and the opinion of the court is reported in 110 Mich. 203. It was then held that claimant was entitled to compensation for services rendered in an attempt to probate the will; that an executor may elect to take compensation under either section 9015 or section 5959, 2 How. Stat.; and that, if he elects to take for actual services in lieu of the percentage fixed by law, he is limited to $1 per day, except in cases of unusual difficulty and responsibility.

It is claimed by the appellant that claimant charges the estate for her services as executrix, 59 days from April 1, 1893, to April 2, 1894; 35 days from April 3, 1894, to May 23, 1894; and for extraordinary services, responsibility, and service in preparation for the second trial of the will case, etc. And it is contended that she is, therefore, limited to $1 per day, unless her services were of unusual difficulty and responsibility, and it is said that there was no finding that these services involved unusual difficulty or responsibility. We think the criticism of the finding too technical. There is a finding that claimant performed extraordinary services, not required of an executor or administrator in the common course of his duties. It would seem to follow that the care was of unusual difficulty or responsibility. The case is one of unusual difficulty in which the executor is required to perform extraordinary services, not required of an executor in the ordinary course of his employment.

It is also contended that, as a matter of law, the services are not of an extraordinary character; but we consider this question ruled against the contention on the former appeal. See, also, *Wisner* v. *Mabley's Estate*, 74 Mich. 143.

It is also contended that the sum allowed is not justified by any evidence in the case. There was testimony tend-

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ing to support the claim of the executrix, and when this is so the allowance is within the discretion of the trial judge. *Mower's Appeal*, 48 Mich. 441.

It is contended that the circuit judge erred in refusing to find separately the amount allowed for ordinary and the amount allowed for extraordinary compensation. The answer to this is that all that was allowed was for what the circuit judge determined to be extraordinary services.

We discover no error in the proceeding.

Judgment affirmed.

LONG, C. J., GRANT and MOORE, JJ., concurred. HOOKER, J., did not sit.

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## BOYDEN *v.* WALKLEY.

1. PRIVATE SEWERS—AUTHORITY TO CONSTRUCT—CLERICAL ERROR.
   A clerical error in a resolution of the common council granting permission to a lot owner to construct a private sewer in the street, whereby authority was given to construct the sewer upon the "westerly" instead of the "easterly" side of the street, as contemplated by all the parties, will not abridge the rights of the owner in a sewer constructed and maintained for several years upon the easterly side.

2. SAME—MUNICIPAL CORPORATIONS—PUBLIC STREETS.
   A city having no sewer system of its own may grant to a citizen, under proper circumstances and restrictions, the right to construct a private sewer in the streets at his own expense, which may be used by him without interference by other citizens.

3. SAME—RIGHTS OF OWNER—INJUNCTION.
   The owner of a private sewer, who has the exclusive right to use the same, may maintain a bill to enjoin its use by other citizens, who connect therewith without his consent, where such use results in clogging the sewer and flooding the owner's house.



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Appeal from Ottawa; Padgham, J. Submitted June 10, 1897. Decided July 13, 1897.

Bill by Charles Boyden and Jukie Boyden to enjoin Wyllis S. Walkley and John Juistema from depositing sewage in complainants' private sewer. From a decree for complainants, defendant Walkley appeals. Affirmed.

*George A. Farr*, for complainants.

*McBride & Danhof*, for appellant.

MOORE, J. Prior to 1884, complainants were owners and occupants of a residence and grounds in the city of Grand Haven, upon which they had expended about $20,000. The city had no system of public sewerage. A private sewer existed on Franklin street. Complainants, having arranged with the owners of that sewer to make a connection with it, obtained from the common council of the city of Grand Haven, in 1884, by resolution, permission to construct a private sewer, at their own expense, along Fourth street, to connect with the Franklin street sewer. They at once proceeded to construct this sewer at an expense of upwards of $224, and continued to use it until November, 1895, at which time the defendants sought permission from complainants to make connection with the sewer, and offered to pay for the privilege. Complainants, thinking the sewer not large enough to allow the defendants to make the connection, declined to let them. Defendant Walkley then had a talk with the mayor and an alderman, and says he was advised by them to make the connection with the sewer, if he desired to do so. A sewer was then built from the residences of the two defendants towards Fourth street, upon which street the lots of defendants fronted, until they were merged into one sewer, which was then extended to and connected with the sewer built by complainants. The bill in this case was filed to enjoin defendants from using said sewer, and a decree was made according to the prayer of the bill, from which decree defendant Walkley appeals.

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A number of questions are raised by the solicitors for appellant, some of which we do not deem to be very important. The sewer was constructed upon the easterly side of Fourth street. The resolution granting the permission provided for the construction of the sewer on the westerly side of Fourth street. It is claimed that, as complainants did not put the sewer where they were authorized to put it by the resolution, they have no right at all to the sewer where it is. We do not think this claim has any merit. The use of the word "westerly" was evidently an error, probably a clerical error. There is everything to indicate this. To put the sewer on the westerly side of the street would make it necessary to cross Fourth street, when there was no good reason for doing so. After the adoption of the resolution, the sewer was constructed at once, and the municipal authorities have never questioned its proper location.

The important question in the case is: Can a city or village, having no sewer system of its own, grant to a citizen, under proper circumstances and restrictions, the right to construct a private sewer, at his own expense, in the streets of the municipality, which, when constructed by him, may be used without interference by other citizens, without his consent? The charter of the city conferred upon the common council the power to make drains and sewers, and to "compel the owners of all occupied lots within said city to construct private drains or sewers therefrom to connect with some public sewer or drain, and to prescribe the form, dimensions, and manner of construction of such private drains and sewers," etc. Act No. 243, Laws 1871, § 89. In 2 Dill. Mun. Corp. § 688, it is said:

"The power of the public, or of the municipal authorities, representing by delegated authority the public, over streets, is not confined to their use for the sole purpose of travel, but they may be used for many other purposes required by the public convenience. * * * With respect to streets in populous places, the public convenience requires more than the mere right to pass over and upon them. They may need to be graded and brought to a level, and

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therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make culverts, drains, and sewers upon or under the surface. Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public; of which, when not done in an improper and negligent manner, the adjoining fee holder cannot complain."

The case of *Wood* v. *McGrath*, 150 Pa. St. 451, is an instructive case. The borough council authorized a citizen to construct a private sewer along a public street, without the consent of an abutting lot owner. It was there, as here, contended that the council exceeded its authority when it did this. The court, after referring to cases which sustain the right of municipal councils to grant to an individual the right to lay a water pipe in the street, said:

"But it is too plain for argument that, if a borough has the power to grant to an individual the right to lay a water pipe in the streets for his exclusive use, it must also, by parity of reasoning, possess the entirely similar power to grant permission to a citizen to lay a drain pipe in the streets, to lead off the surplus or refuse water from his building. The objection in the latter case is that the streets can only be used for public purposes, and not for those which are private. * * * The conclusion of the court below was based upon the idea that the abutting owner is the owner of the fee of the land occupied by the street, and the laying of a drain pipe under the street without his consent is an invasion of his right as owner of the land. How fallacious this proposition is, is at once apparent when it is considered that the right of the public in the streets of cities, boroughs, and towns is far more extensive than the mere right to use the surface of the land for the purpose of passage. * * * The argument on the part of the plaintiff proves too much. It denies entirely the right of the borough to allow a private owner along a street which has no drain to connect with a drain on another street, unless the consent of all intervening owners be obtained. In many towns and boroughs of the

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Commonwealth, the pipes and drains and sewers are not laid on all the streets, but on a few of the principal streets. It follows from the contention of the plaintiff that all citizens owning properties on the side streets which have no pipes or drains cannot obtain their gas or water, and cannot connect with the sewers and drains, because the municipal authorities cannot give them permission to do so. This certainly is not the law, * * * nor is there any good reason for holding such a doctrine. The streets and alleys of cities, towns, and boroughs are under the control and direction of these municipalities, and they have all the power over them that can lawfully exist. They are the universally recognized channels of communication between the different parts of the municipal territory, and no private interest in or ownership of the subsoil is permitted to interfere with the free use of both the surface and the subsoil by the municipal authorities, or by their delegated substitutes. * * * It does not lie with the adjoining owners to say they admit that the borough authorities can use them for all public purposes, but cannot permit their use for the same kind of purpose by a private citizen, because we have already decided they can do so; and if the use permitted is of the same kind to which the surface or subsoil of the streets may be devoted, they have no more right to object in the one case than in the other."

See *Smith* v. *Simmons*, 103 Pa. St. 32 (49 Am. Rep. 113); *Borough of Susquehanna Depot* v. *Simmons*, 112 Pa. St. 384 (56 Am. Rep. 317); *Stevens* v. *City of Muskegon*, 111 Mich. 72.

The appellant says the council cannot give the exclusive use of the street to an individual. There has been no attempt to do so by the council. If the defendants desire to construct a private drain on this street, there is no doubt the council will give them the right, under proper restrictions, to do so.

It is said the council cannot relinquish its duty to supervise the sewers of the city. That question is not here, and there will be time enough to discuss it when it is here.

It is urged that complainants have not shown irreparable injury, and are not entitled to an injunction. The

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testimony is very conflicting as to the effect of the connection made by the defendants; the witnesses for the defendants testifying that, in their judgment, no injury is done. On the other hand, it is made to appear that the sewer worked perfectly for more than 11 years, and gave no trouble until the connection was made, and that, within a short time after defendants began to use the sewer, it became clogged twice, so that the basement of complainants' house was flooded with its contents, and the help of the fire department was required to flush it, so it would perform its office again. Who that values the health of himself and family would put a money price upon the risk incurred in having a defective sewer coming into his dwelling? In *White* v. *Forbes*, Walk. Ch. 114, an injunction was issued to prevent the flooding of land. In disposing of the question, the court said:

"Every man has a right to the enjoyment of his property undisturbed by another, and to be protected in that enjoyment, and what one may consider of little value, another may esteem very highly. The court will not, in cases of this kind, be governed by dollars and cents alone, but will inquire whether the injury is of such a nature that it can reasonably be supposed to lessen materially the enjoyment of property by its owner. The complainant lives on the premises. They are his home. He places a high value on the land, and wants it for a meadow, and he is apprehensive that the flooding of it will generate disease, and render the atmosphere of his dwelling less salubrious."

We have no doubt the common council had the right to and did authorize the construction of this sewer. When constructed by complainants, at their own expense, they had a right to its enjoyment, free from the interruption or interference of private citizens.

The decree is affirmed, with costs of both courts.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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## MICHIGAN TRUST CO *v.* GRAND RAPIDS DEMOCRAT.

1. LABOR DEBTS—INSOLVENT NEWSPAPER CORPORATION — EDITORS AND REPORTERS.

   Debts owing by an insolvent newspaper corporation to its employés for the gathering of news items, the performance of editorial work, the preparation and correction of copy, and the reading of proof, are not debts for labor, within 8 How. Stat. § 8749*m*, making such debts preferred claims against the estate of an insolvent.[1]

2. SAME—MAILING CLERKS.

   But the amount due to a mailing clerk for getting out, addressing, and mailing the paper to the various subscribers is a debt for labor, within the meaning of the statute.

3. SAME—FORECLOSURE PROCEEDINGS—INTERVENERS—OPENING OF DECREE.

   Where a former employé of an insolvent corporation intervened in foreclosure proceedings against such corporation after the rendition of a decree therein providing for the sale of the mortgaged property, and of certain accounts and bills receivable assigned to S. by the mortgagor, and reassigned to the mortgagee, after the labor for which the intervener claimed had been performed, and directing that S. be paid out of the proceeds a specified sum, exceeding in amount the intervener's claim, it was not necessary that such decree be opened or modified in order to enable the intervener to obtain relief, but his debt could properly be made a charge upon the fund apportioned to S.

Appeal from Kent; Adsit, J. Submitted June 16, 1897. Decided July 13, 1897.

Bill by the Michigan Trust Company against the Grand Rapids Democrat to foreclose a chattel mortgage. M. Almy Aldrich and other employés of the defendant corporation severally filed petitions as interveners for prefer-

[1] On the question who are laborers, employés, or servants, within the meaning of statutes giving them preferences, there is a note to *Tod* v. *Kentucky Union R. Co.*, in 18 L. R. A. 305.

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ence as to their several claims for compensation. From a decree in favor of the interveners, complainant appeals. Reversed, except as to intervener Clarence J. Toot.

*Fletcher & Wanty*, for complainant.

*Kingsley & Kleinhans*, for defendant.

*Hatch & Wilson*, for intervener M. Almy Aldrich.

*Peter Doran*, for interveners Edwin J. Bulkley and William M. Hathaway.

*Stuart & Barker*, for intervener Clarence J. Toot.

MOORE, J. The interveners were allowed certain claims, which complainant was directed to pay as preferred claims. It is the claim of the interveners that the claims were properly allowed as preferred claims, under the provisions of 3 How. Stat. § 8749*m*, which provides that—

"All debts which shall be owing for labor by any person or persons or corporation at the time he, they, or it shall become insolvent shall be preferred claims against the estate of such insolvent debtor or debtors, and have precedence in the payment thereof over all debts owing by such insolvent debtor or debtors at the time of becoming insolvent which shall not have become a lien on such estate, or some portion thereof, prior to the performance of the labor for which such debts for labor shall be owing."

The first petition of Aldrich states that—

"The nature of the work and labor performed by your petitioner * * * was the writing of editorials, and the performing of various kinds of editorial work, required to be done on the daily and weekly issues of the Grand Rapids Democrat, the newspaper published by the said defendant, the preparation and correction of copy for the printers, the direction of the make-up of the paper, including full charge of all branches of the mechanical department of said paper after the close of the business office each night."

His second petition states the nature of the work to be the same, only adding that the editorial work was done under the direction of a superior. The petition of Clar-

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ence J. Toot states that the nature of the work performed by him was that of mailing clerk, which consisted in attending to the getting out, addressing, and mailing of the newspaper to its various subscribers, and putting in appropriate packages, and delivering to the proper persons, the proper number of papers allotted to each. The petition of Edwin J. Bulkley says that the nature of the work performed by him was that of proof reading, and traveling around the city, gathering news. The petition of William M. Hathaway states that the nature of the work performed by him was that of reporting, going around to the different wholesale houses, collecting market reports, and assisting in editorial work and proof reading.

This statute has been repeatedly construed by this court, and, while the precise questions raised in this proceeding have not been passed upon, we think the logic of the decisions is against the decree found by the learned circuit judge. The labor performed by the petitioners, with one exception, was intellectual, rather than manual. It was the work of professional men, rather than the work of laborers, giving the word its ordinary acceptation, and is not such work as is intended to be covered by the statute. *In re Clark*, 92 Mich. 351; *In re Sayles*, Id. 354; *Appeal of Clark*, 100 Mich. 448. The exception mentioned is the work performed by Mr. Toot. His labor was mechanical and manual, and is clearly embraced within the terms of the statute. *Appeal of Black*, 83 Mich. 513.

It is said that, as the petition embracing the claim of Mr. Toot was not filed until after the decree was rendered, and the decree has not been reopened or modified, it is too late to give Mr. Toot any relief. The decree embraces items of accounts and bills receivable that were assigned after this work was done to Mr. Stevenson, and afterwards assigned by him to the complainant. This decree provides that the fund be brought into court, and apportions to Mr. Stevenson upwards of $2,000. As Mr. Stevenson's claim is subsequent to that of Mr. Toot, we can see no

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great difficulty in providing for the payment of Mr. Toot's claim out of the fund, and it will be so ordered.

The decree, as to the other petitions, will be reversed, and petitions dismissed, appellant to recover costs, except as to Mr. Toot, and Mr. Toot to recover costs.

The other Justices concurred.

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DOUGLASS *v.* BOARDMAN.

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1. INJUNCTION BILL—PARTIES — DIVERSITY OF INTERESTS — MULTIFARIOUSNESS.

A bill by the owners of separate lots, who derive their titles from the same source, to enjoin one claiming a dower interest therein from instituting ejectment suits against them to recover such interest, and from prosecuting suits already instituted, is multifarious.

2. SAME—DOWER—FRAUD AND EXTORTION—EVIDENCE.

An attorney's assertion of his client's claim of dower in certain lots in an amount greatly in excess of that which the owners believe to be justifiable, and his threat that, if the amount is not paid, he will institute suits in ejectment, which would involve costs to an extent rendering it more expensive for the owners to litigate than to accede to his demands, is not such an indication of fraud as will justify a court of equity in enjoining the prosecution of the suits at law.

Appeal from Kent; Grove, J. Submitted June 11, 1897. Decided July 13, 1897.

Bill by Andrew L. Douglass and others against Mary L. Boardman and Clark H. Gleason to enjoin the prosecution of ejectment suits. From an order overruling their several demurrers to the bill, defendants appeal. Reversed.

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*Sweet, Perkins & Judkins* (*Kingsley & Kleinhans*, of counsel), for complainants.

*C. H. Gleason* and *Arthur Lowell*, for defendants.

MOORE, J. The defendant Mrs. Boardman claims a dower interest in upwards of 250 lots in the city of Grand Rapids, owned by about 130 persons, who are now in the possession thereof. Mrs. Boardman has brought four ejectment suits to recover her dower, and threatens to bring others. The defendant Gleason is her attorney in the ejectment suits. The defendants in the ejectment suits and 87 other lot holders joined in filing a bill of complaint, in which they allege that they are owners in fee, and in possession, of their respective lots; that they get their title from one source; that the assertion of a claim of dower by defendant Mrs. Boardman constitutes a cloud upon the title of complainants, and affects them all in the same manner. The bill alleges that the defendant Mrs. Boardman is not now, and never has been, entitled to any dower interest in said lands. It also alleges that, when the husband of defendant Boardman died, the real estate was not of much value; that Mrs. Boardman knew of improvements of great value being put upon said lands, and made no claim of right of dower; that, if she is entitled to any dower, it would amount to no more than $3 or $4 in value on each lot, and that defendant Gleason, with full authority to act for his client, has offered to take a money compensation for the right of dower, varying from $15 to $45 a lot, and endeavors to get from complainants in that way $7,000 for what is worth not more than $700, and threatens to commence ejectment suits if Mrs. Boardman's demands are not acceded to; that defendant Gleason asserts he could recover costs, amounting to from $40 to $50 in each ejectment suit, and that it would be cheaper for the complainants to settle upon his terms than to litigate; and that the purpose of now asserting a claim to a right of dower is to subject complainants to expense, in the way of costs, out of proportion to the value of the dower interest. The

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prayer is that defendant Boardman be decreed to have no right of dower, that she be decreed to relinquish her claim of dower, or, if the court should find that she has a valid dower interest, that its value may be determined, and a gross sum of money fixed in lieu thereof, and that both defendants be enjoined from prosecuting the ejectment suits already commenced, and from commencing others. The bill also contains a general prayer for relief. It does not ask the court to determine what proportion of the gross sum allowed in lieu of dower should be paid by each complainant.

Defendants demurred to the bill on various grounds. Those necessary to mention are: *First.* Complainants have a complete remedy at law. *Second.* Because defendant Boardman has a right to have her dower interest, and its value, determined at law, instead of at equity. *Third.* Because the bill shows that it is exhibited by said complainants for distinct and separate matters, in which complainants are not jointly interested. The demurrers were overruled, and defendants appeal.

The case of *Winslow* v. *Jenness*, 64 Mich. 84, was a case where a large number of complainants filed a bill to restrain the prosecution of 21 ejectment suits, brought by the defendant Gertrude Smith to recover an undivided one-third interest in the lands. The defendants in the several ejectment suits derived title from the same sources, and claimed they were affected in the same manner by the assertion by Mrs. Smith of her interest in the lands, and as to the principles involved the case was like this case. As that case is so accessible, it is not necessary to refer to it in detail. It was held that the bill was multifarious. See, also, *Jenness* v. *Smith*, 64 Mich. 91; *Brunner* v. *City of Bay City*, 46 Mich. 236; *Barker* v. *Township of Vernon*, 63 Mich. 516; 1 High, Inj. § 62. These cases should control the present one, unless it can be said that a different rule applies where ejectment is brought for dower than obtains where it is brought to recover an undivided interest. We have not had our attention called

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by the learned counsel to any cases making such a distinction.

2 How. Stat. § 7789, subd. 2, provides that ejectment may be brought by any widow entitled to dower, and she ought not to be deprived of that right unless it is made very clear that injustice will be done. *Rea* v. *Rea*, 63 Mich. 257. It is urged that, as Mrs. Boardman's dower interest is small in value, while she claims much more than it is worth, and her attorney has urged complainants to settle, asserting that his client would be entitled to costs, in each case amounting to $40 or $50, and that it would be cheaper for them to settle, this operates as a legal fraud upon complainants.

We cannot arrive at the same conclusion reached by counsel. We draw from this statement the conclusion that complainants put one value upon the dower interest, and the attorney another, and that, as they did not agree, the attorney asserted that, if they could not agree, he must bring suit, which would involve costs, and that it would be cheaper to settle than to litigate. We do not see in all this any such indication of fraud as would justify a court of equity to interfere with a proceeding at law. The demurrers should have been sustained.

The decree is reversed, and the bill of complaint dismissed, with costs of both courts.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.

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TOWNSHIP OF MAPLE VALLEY *v.* FOLEY.

118 622
f116 60
113 622
120 442

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—ESTOPPEL.

A conveyance by a husband to his wife, without a present consideration, made at a time when the husband is sought to be held as surety upon the bond of a defaulting township officer, and embracing property the title to which has stood in his name for 25 years, and which was included in his estimate of assets when he gave the bond and justified as to his responsibility, is fraudulent as to the township, even though the property was originally purchased under an arrangement entered into by the wife without the knowledge of the husband, and was paid for out of a common fund to which her earnings contributed.

Appeal from Wayne; Carpenter, J. Submitted June 11, 1897. Decided July 13, 1897.

Bill by the township of Maple Valley against James Foley and wife in aid of execution. From a decree dismissing the bill, complainant appeals. Reversed.

*Avery Bros. & Walsh* and *E. C. Babcock*, for complainant.

*T. E. Tarsney*, for defendants.

MOORE, J. Complainant filed a bill to set aside a conveyance made by James Foley to his wife, Mary Foley, and to subject the real estate described therein to levy and sale upon an execution obtained by the complainant against James Foley and others. In the circuit court the bill was dismissed. The complainant appeals.

In April, 1891, James Foley and another became sureties on the bond of the town treasurer for the township of Maple Valley. Mr. Foley at that time justified as to his responsibility, and declared himself worth $3,000 over and above all liabilities and exemptions. The township

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treasurer became a defaulter, and in October, 1892, his bondsmen were notified that the township would look to them for the deficiency. April 13, 1893, James Foley conveyed to his wife certain real estate on Porter street, in Detroit, without any present consideration passing between them. The bill seeks to subject that property to levy and sale, and also other property. The solicitors for complainant concede that they have not made such a case as to entitle them to reach the other property, and the discussion will be confined to the Porter-street property. A claim is made on the part of the defendants that the pleadings are so defective that complainant cannot recover, but the record is in such condition that we do not think the claim can now for the first time be urged.

At the time the bond was given, the defendants both lived in Sanilac county, and had lived there since 1880, upon a farm which was worth $3,000 at the time the bond was given. We think it is fairly established by the evidence that, if the Porter-street property was not included in his estimate when he gave the bond, the defendant James Foley was not worth, over and above his liabilities and exemptions, the sum of $3,000. The defendants were married in 1861, in Detroit, where they continued to live until they moved to Sanilac county. At the time of the marriage, James Foley owned 80 acres of wild land in Sanilac county, and had about $40 in money. His wife at that time had about $130 in money. It is claimed on the part of the defendants that the Porter-street property was bought by the wife, and paid for by what she was able to earn in taking in washings, taking boarders, and from the products of fowls and cows which she kept. It is also claimed that the making of the deed in April, 1893, was for the purpose of giving to the wife the legal title of what was already equitably hers.

It is shown by a preponderance of proof that both defendants were industrious people. James Foley was in the employ of a railway company. The wife, in addition to attending to her household duties, took in washing,

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and took some boarders, and also, at times, kept cows and hens, and sold butter and eggs. For a time after they were married, defendants lived in rented houses. Mrs. Foley tired of this, and, without consulting with her husband, arranged to buy the Porter-street property, which was sold upon credit. When told of what she had done, the husband said he had the 80 acres of land, and did not want any city property. The husband delivered to the wife his earnings, and the first $40 paid on the Porter-street lot was furnished by him. The other payments were made out of the common fund to which both had contributed. A house was built upon the property at an expense, including the painting, of nearly $400. This was also paid out of the common fund.

The deed to this property was made August 10, 1867, and was made to James Foley. Mrs. Foley did not read or write, but at the time the deed was brought home she knew it was made to her husband, and at that time it was talked that it should have been made to her. The deed was kept until June, 1878, when it was for the first time put upon record. In 1880 the defendants moved to Sanilac county, and the house on Porter street was rented. The rent was applied to the payment of the taxes, and the balance from time to time was sent in a registered letter to James Foley, in Sanilac county. It is claimed by defendants that the money was at once turned over to Mrs. Foley. After the removal to Sanilac county, James Foley often spoke of his Detroit property, and of his receiving rent from it, and of the taxes being high; and upon one or two occasions Mrs. Foley was present, and participated in a talk of like character with a store keeper who was selling Mr. Foley goods upon credit. At the time defendant Foley signed the bond and justified as to his responsibility, he said the valuable part of his property was the Detroit property. The property was assessed to Mr. Foley, and it was insured in his name. After the default occurred in the bond, Mr. Foley swears, he consulted a lawyer, and was advised by him to deed the

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Porter-street property to his wife; that he then consulted his wife, who wanted the deed made to her to secure her; and that he then made the deed to her. The wife testified that the deed was recorded before she went to Sanilac county; that she left it that way until the township treasurer failed. She further testified:

"I got the deed because there was danger. The danger was this lawsuit pending. That was the reason I wanted him to give me the deed of the place."

The record shows that Mr. Foley consented to his wife's taking boarders and taking in washing and keeping the fowls and cows, but it does not show that it was agreed that she should have the proceeds. Mrs. Foley testified:

"There was no talk between myself and husband that what I earned taking in boarders and selling milk belonged to me."

It is very evident that, while the purchase of the property was due to Mrs. Foley, it was paid for by the earnings of Mrs. Foley and her husband. The title was taken in his name, and held by him for more than 25 years. No attempt was made to put it in the name of anybody else until Mr. Foley became involved, and was likely to have a judgment rendered against him, and because of that fact the title was transferred from him to his wife. However innocent may have been the motives of the parties to the transaction, it was a legal fraud as to the creditors of Mr. Foley. 2 How. Stat. § 6203; *Felker* v. *Chubb*, 90 Mich. 24; *Iseminger* v. *Criswell*, 98 Iowa, 382; *Carbiener* v. *Montgomery*, 97 Iowa, 659.

The property is doubtless worth more than the amount of the debt. The defendants are given 90 days in which to pay the judgment, with interest and costs. In default of such payment, the deed will be set aside as to complainant, and the land be sold.

The decree below is reversed, and one will be entered here as indicated above.

LONG, C. J., GRANT and MONTGOMERY, JJ., concurred. HOOKER, J., did not sit.



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113 626
s126 143

113 626
155 49

## COMSTOCK *v.* McDONALD.

PARTNERSHIP—DEATH OF PARTNER—RECEIVERS.

A receiver of partnership property should not be appointed against the objection of surviving partners, at the solicitation of the representatives of a deceased partner, against whom a suit has been instituted by the survivors for an accounting and to enable them to purchase the share of the deceased, where the survivors are abundantly responsible, and able to do justice on a final accounting, and there is no tangible evidence that they are wronging the representatives of the deceased.

Appeal from Alpena; Kelley, J. Submitted June 15, 1897. Decided July 13, 1897.

Bill by Andrew W. Comstock and William B. Comstock, surviving partners of the firm of Comstock Brothers, against George R. McDonald, administrator of the estate of Joseph B. Comstock, deceased, and others, for an accounting. From an order appointing a receiver upon the application of defendants, complainants appeal. Reversed.

Previous to 1886, the complainants and one Bewick constituted a copartnership doing business at Alpena under the name of Bewick, Comstock & Co. Their business was extensive, and included lumbering operations (including the running of sawmills), banking, the ownership of vessels, etc. The defendants assert that an inventory of the property owned by this firm, or, more properly speaking, its successor, amounted in 1894 to the sum of $2,000,000. In the year 1886 an agreement was made by which Bewick was to sell his one-third interest in this concern and its business to his two partners for the sum of $300,000, from which we may infer that $1,000,000 was not far from the value of the assets at that time. At this time

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the complainants had a younger brother, Joseph B. Comstock, who was not engaged in business for himself, but was in their employ as bookkeeper, and it was arranged that he should take one-ninth interest in the new copartnership to be formed and carried on under a firm name after the retirement of Bewick. Accordingly the three brothers purchased the interest of Bewick for $300,000. It is in connection with this transaction that one of the principal questions in the case arises, it being contended on behalf of the defendants that this sum of $300,000 was to be paid for by the partnership from its profits, while the complainants contend that each partner was to be charged with one-third of the purchase price, though it was to be paid for by the copartnership from its assets.

In August, 1894, Joseph B. Comstock died, and Andrew W. Comstock was appointed administrator and guardian of the children. William B. Comstock was appointed one of the appraisers, and aided in making the inventory mentioned, and an allowance of $200 a month was made by the probate court, which has been paid to the widow. Subsequently negotiations were had between the complainants and the widow with a view to the purchase by them of the interest of the estate of Joseph in the business and property, and an offer of $100,000 in cash was made. The parties were unable to agree, and A. W. Comstock having resigned as administrator, and the defendant McDonald having been appointed as his successor, the complainants filed the bill of complaint in this cause, setting up the existence of the partnership, the character and extent of its business and property, the death of Joseph, the appointment of the administrator, and the futile effort at a settlement, and alleging that the best interests of all concerned, considering the stringency of the times, would be conserved if the assets of the firm should be offered for sale in some way that would permit the complainants to buy. The bill prayed for an accounting, and a decree that the real estate, which stood in the individual names of the members of the firm, was partnership property, and

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that a receiver be appointed to take possession of all of the partnership property, and, under the direction of the court, to sell or dispose of the same, in mass or in parcels, and that the complainants be allowed to become purchasers. In this connection it should be stated that the bill alleges that the widow's claim of value was excessive, and that she denied any liability on the part of the estate for the purchase of its share in the concern, and the bill prayed that this question might be settled.

The answer of the administrator alleges that the widow and children have very little property, and therefore that it would be to their interest to have the property sold in parcels, and that a receiver should be appointed to take charge of the assets of the copartnership until the property can be sold. It proceeds to allege delay and fraud in settling the estate, to the injury of the widow and heirs of Joseph. Subsequently a petition was made alleging that the complainants were still carrying on the business of the copartnership, and had made no effort since filing the bill to determine petitioners' interests, but ignored their interests, and continued the business with the assets, without endeavoring in any manner to close out said business, or determine the interests of the petitioners therein; that an examination of the books showed that they were treating the assets of the copartnership as their own. It also states in detail certain charges, which, in effect, debit the estate with amounts paid by the firm upon the purchase price of Joseph's interest, with interest on the amount advanced by the firm; also that they have charged themselves with large sums which they have withdrawn from the business, and with these moneys have bought large tracts of valuable land, and that they have admitted one Jolly to an interest in the profits of the business. The petition, which was filed October 2, 1896, prayed the appointment of a receiver and an injunction. It was verified on information and belief by the widow, and counsel appended an affidavit that he had examined the books, and heard the testimony of the complainants,

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taken under the statute in behalf of the petitioners, and stating his conclusion therefrom to the effect that at some time, not stated, after the death of Joseph, the complainants opened a new set of books; that all moneys collected by them as survivors were appropriated by them, each being charged with one-half; that in January, 1895, they charged $99,000 to the estate of Joseph for which there was no consideration or transaction except a claim of complainants which antedated the charge more than eight years, and that at the same time said complainants, from the profits of the concern, took a credit aggregating more than $185,000, and that between November 19, 1895, and August 1, 1896, they took credits from the firm of over $150,000 more.

Thereupon the court made an order appointing the Union Trust Company of Detroit receiver of all of the partnership property (describing it), and requiring a just and accurate statement of all collections made and other transactions of said business since the death of Joseph, within 20 days. From this order an appeal was taken to this court.

*Frank Emerick*, for complainants.

*McDonell & Hall*, for defendants.

HOOKER, J. (*after stating the facts*). The evidence upon which this order was made was that of the complainants, taken by the defendants under the statute, certain documentary evidence from the probate court, and the testimony of Bewick and his son, taken by deposition on behalf of the complainants. The testimony is not voluminous, and the facts do not seem to be disputed, except upon the question of the intestate's purchase. In this particular, upon the present record, we think the claim of the widow and administrator is not sustained. It is based on what they seem to claim was a gift by the complainants to Joseph of one-third interest in their two-thirds of the business and property on condition that

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Joseph would purchase one-ninth, and have it charged to him on the books, which charge, by the way, was not made. This claim is sought to be sustained by invoking the aid of the statute prohibiting the parties to testify, and by treating the testimony of the Bewicks as hearsay. This cause is not here upon final hearing, as we judge that it might easily have been, for it was, or might have been, at issue in December, 1895, and it is stated without denial that it had passed the September term, 1896, against the opposition of the complainants, and this petition was filed a month later.

To the contention that this was a consent order, the record is a complete answer. *First*, the parties were in court contesting it; and, *second*, the bill did not ask a preliminary order, but only after a full hearing and accounting, which apparently the complainants were willing to have taken. It is evident that this bill was filed—*First*, to settle this claim made on behalf of Joseph's estate; and, *second*, to enable the purchase by the complainants upon some fair basis of a business which they had built up by years of hard work, and which they might naturally desire to continue. We may well take notice of the difficulties of closing out a business of this kind, in the strict sense of selling and scattering its various assets, whose chief value consists in the fact of their aggregation, under competent management; difficulties which are intensified by the financial conditions which have prevailed for a few years past. We do not overlook the natural proclivity to purchase at a low price, and realize that surviving partners may have opportunities to perpetrate wrongs upon the representatives of deceased partners, but we think there should be more tangible evidence of it than there is in this case before taking away their control, and placing it in the hands of others. The complainants appear to be abundantly responsible, and no doubt can be made to do justice upon a final accounting. If wise counsel prevail, it would seem that the parties might adjust their rights upon a fair basis without the vexation

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and loss of protracted litigation. If they cannot, a fair accounting can doubtless be had through the courts.

The order appointing a receiver is reversed and set aside, with costs of both courts.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. LONG. C. J., did not sit.

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KIRKPATRICK v. MEHALITCH.[1]

118 681
s116 659

1. CORPORATIONS—GOODS SOLD AND DELIVERED—INDIVIDUAL LIABILITY OF STOCKHOLDERS—JUDGMENTS.

A judgment against a corporation upon its acceptance of a draft for the purchase price of goods sold to it under an arrangement with its treasurer that an accounting between it and the vendor should be had at stated intervals, and that 30, 60, and 90 day acceptances should be given and received for the amounts found due, is, in the absence of evidence that the accepted draft was itself received as payment, a judgment for goods, wares, and merchandise, within the meaning of the statute (1 How. Stat. § 3940) making stockholders individually liable on such judgments after execution against the corporation has been returned unsatisfied.

2. SAME—EXTENSION OF TIME—RELEASE OF SURETY.

The contention that a stockholder's relation to the corporation with respect to goods sold and delivered to it is that of surety, and that an extension of time to the corporation by taking its acceptance at a certain number of days for the purchase price operates to release the surety, is not applicable to a case where the giving of the acceptance is one of the terms of the contract under which the sale was made.

Error to Houghton; Hubbell, J. Submitted June 15, 1897. Decided July 13, 1897.

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[1] Rehearing denied September 15, 1897.

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Proceedings by Allan Kirkpatrick against William Mehalitch under 1 How. Stat. § 4886 *et seq.*, to enforce the individual liability of defendant for goods sold to a corporation in which he was a stockholder. From a judgment for defendant, plaintiff brings error. Reversed.

*Dunstan & Hanchette*, for appellant.

*A. T. Streeter*, for appellee.

HOOKER, J. The plaintiff sold produce, etc., to the Mechanics & Miners' Co-operative Association, a corporation organized under chapter 116, 1 How. Stat., under an arrangement made with the treasurer that an accounting should be had on each pay-day, and that 30, 60, and 90 day acceptances should be given and received for the amount found due. The goods which are the basis of this action were sold in May and June; and after pay-day, June 21, 1895, two drafts were made out, each for $280.98, for a bill of $561.96, and were accepted by the treasurer. The following February, two justice's judgments were taken upon these. Transcripts were filed and circuit court executions were taken out, and, being returned unsatisfied, the plaintiff filed a petition under 1 How. Stat. § 4888, and after obtaining a report by the secretary, giving the names of the stockholders of the corporation, had citation issued to each stockholder. Shares of stock are $10 each, and the defendant was the owner of two shares.

The object of the proceeding by petition was to collect such judgment from stockholders, under section 6 of the organic act (1 How. Stat. § 3940), which provides:

"Stockholders and directors shall be severally and jointly liable for all debts for labor performed for said corporation; and for all goods, wares, and merchandise sold and delivered to any such association, each of the stockholders or directors thereof shall be held liable to the amount of his capital stock therein, and no more; but no execution shall issue against such director or stockholder individually, until a judgment be first obtained for such

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goods, wares, and merchandise against said association, and execution thereon be returned unsatisfied, in whole or in part."

The important questions upon the record are two: (1) Were the judgments for goods, wares, and merchandise? The defendant contends that they were not. (2) Did the taking of acceptances extend the time for the payment, and release the stockholder? The defendant maintains that it had this effect.

There can be no doubt that the obligation was incurred upon the purchase of goods, wares, and merchandise. It is contended that the judgment was upon an acceptance, and therefore not "a judgment for goods, wares, and merchandise," within the statute,—insisting upon a strict and literal interpretation of the statute. The price of these articles was determined by a contract, as were also the terms of payment. The acceptances should not be considered any more than evidence of the obligation. There is nothing to indicate that they were designed as payment, or that the original demand was lessened in any degree by them. We think that the circuit court erroneously held that a judgment based upon these acceptances, and showing that they were given for goods, wares, and merchandise, was not a judgment for goods, wares, and merchandise.

Again, if, as contended, the defendant is a surety of the corporation, as held in *Hanson* v. *Donkersley*, 37 Mich. 184, and an extension of time within which the debt might be paid would release him, there is no opportunity for the application of the doctrine in this case, for the acceptances did not have the effect of extending the time beyond that fixed by the terms of the contract. There is nothing in the act that prohibits a purchase by the corporation on time, or relieves the stockholder from liability because goods are so purchased.

Upon the argument it was urged, against the reversal of this judgment, that costs to the extent of $3,400 might be incurred in collecting these judgments of $600; but if

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the stockholders will recognize their legal obligations, and perform them, there will be no opportunity for taxing costs.

The judgment is reversed, and a new trial ordered.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. LONG, C. J., did not sit.

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## HURTON *v.* HURTON.

1. APPEAL—REVOCATION OF WILL—OBJECTION NOT RAISED BELOW.
   A judgment refusing the probate of a will executed in triplicate will not be affirmed by the Supreme Court upon the point, raised for the first time in that court, that it is to be presumed that two of the three copies of the will, which were not accounted for on the trial, were destroyed by the testator, and that the will was thereby revoked.

2. CONTEST OF WILL—EVIDENCE—HEARSAY.
   The admission of the testimony of a witness for the contestant of a will, as to what her husband told her with reference to the intention of the proponent to keep them away from the testator, is prejudicial error.

Error to Houghton; Hubbell, J. Submitted June 15, 1897. Decided July 13, 1897.

Edward Hurton, Jr., presented for probate the will of Edward Hurton, Sr., deceased, which was contested by Michael Hurton. Probate was denied, and proponent appealed to the circuit court. From a judgment for contestant, proponent brings error. Reversed.

*Dunstan & Hanchette*, for appellant.

*A. T. Streeter*, for appellee.

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HOOKER, J. Edward Hurton, a native of Ireland, came to the United States many years ago, and for a time lived in Minnesota, but died at the home of his nephew, Edward Hurton, Jr., in Michigan; Edward, Jr., being the son of Michael Hurton, the brother of Edward, Sr., also a resident of Michigan. Shortly before his death, Edward Hurton made a will, which was refused admission to probate and circuit courts, and the proceeding is now before us on error to the circuit court.

The undisputed evidence shows that, at the request of the testator, the proponent's wife wrote a letter for the testator to the custodian of a former will in Minnesota, asking that it be sent to him, and that when he received it he burned it. A short time afterwards he called upon counsel, who drew a new will. Three copies of the paper were made, one being given to counsel with direction to preserve it, one was given to the proponent by the testator, and one was kept by him. The first-mentioned copy was the one offered for probate. In this court, apparently for the first time, counsel raises the point that, the other copies not being accounted for, it is to be presumed that they were destroyed by the testator, and that the will was thereby revoked. We are disinclined to affirm this case upon the sole ground that the copies were not accounted for, as we see no evidence that the question was raised below, but rather that it was tacitly understood that they were not destroyed. It is quite improbable that they were destroyed, and, if contestant desired to make such a claim, it should have been done earlier. We do not discuss the legal phases of this question, as it is not improbable that upon another trial these copies may be produced, thus eliminating the question from the case.

Counsel for the proponent contend that they were entitled to a direction that the jury find for the proponent. We are not greatly impressed with the strength of the contestant's showing, but, in view of the fact that the case must be reversed upon another ground, and the fact that the record is silent as to the whereabouts of the two copies

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of the will, we will not discuss the testimony to determine that there was or was not enough to go to the jury upon the question of incompetency or undue influence. It was a claim of the contestant that the proponent unduly influenced the testator, and an attempt was made to show that the testator was denied freedom of intercourse with friends and relatives after the will was made. One Regina Wright, on examination by counsel for contestant (on whose behalf she was called), testified as follows:

"I am the wife of John Wright, and live in West Hancock. Knew Edward Hurton, the deceased, during his lifetime. Saw him three times at his brother's house, and three times at his nephew's (Ed.'s) house. I was there the last Sunday he was living, in the evening. The next morning I asked the old gentleman if I could come and see him again, and Ed. said, 'Why, certainly you can,' out loud, so the old gentleman heard it, and he muttered to me, 'I don't know about that.'

"*Q.* Why did you ask the old gentleman if you could see him? (To which question the counsel for the proponent then and there objected to the same as irrelevant and immaterial. The court overruled the objection, and thereupon the counsel for the proponent took an exception.)

"*A.* My husband told me that Edward Hurton, Jr., intended to put us out the night before. I never heard Ed. say anything about visitors coming there. (Thereupon counsel for the proponent made a motion that the last answer of the witness be stricken from the record, because she repeated what her husband said to her, it being merely hearsay. The court overruled the objection, and thereupon the counsel for the proponent took an exception.)"

This testimony was hearsay, and not admissible. If it was a fact, and counsel desired to prove that proponent intended to do such a thing, the witness who knew it should have been called for the purpose. Its tendency was to prejudice the proponent.

The order of the circuit judge is reversed, and a new trial ordered.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. LONG, C. J., did not sit.

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## NELSON v. KILBRIDE.

ASSUMPSIT—SALE OF TIMBER BY TRESPASSER—RECOVERY OF PROCEEDS—SUFFICIENCY OF DECLARATION.

One whose timber has been removed and sold by a trespasser may recover the proceeds in an action of *assumpsit*, as money received for his use, and the declaration need not aver the tort. *Watson* v. *Stever*, 25 Mich. 386, distinguished.

Error to Leelanau; Corbett, J. Submitted June 15, 1897. Decided July 13, 1897.

*Assumpsit* by Albert Nelson against James Kilbride for money had and received. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

*Tweddle & Cross*, for appellant.

*Pratt & Davis*, for appellee.

HOOKER, J. The single question raised upon this record is whether an action could be maintained upon a count for money had and received, when the defendant had sold and received money for timber which he cut and removed from the plaintiff's premises under circumstances amounting to a trespass. It is not denied that a recovery may be had in such a case in *assumpsit*, under 2 How. Stat. § 8024, but it is insisted that the declaration must be special, alleging the trespass, and the waiver thereof. Incidentally it is said that title to land was in question, or rather the question of boundary; but this is not discussed by the defendant, and the case of *Hart* v. *Hart*, 48 Mich. 175, seems in point. If it can be said that the question of boundary amounted to a question of title, it was not pleaded, nor was the justice asked to certify the case upon the claim that the testimony showed it to be involved.

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See Tiff. Just. Guide (4th Ed.), 654. There is nothing in the record to show that title or boundary was in dispute before the justice, and the case was taken by appeal to the circuit. The objection was to any proof under the declaration, because it did not allege the trespass and the waiver.

Counsel for the plaintiff rely upon a count for money had and received, and a right to recover, based on the receipt of money by the defendant upon the sale of the timber unlawfully cut. Error is alleged upon the refusal to allow a recovery of such sum, the court having refused to admit any evidence under the declaration, holding that, although a recovery might be had in *assumpsit*, it was necessary to allege the trespass and conversion. In *Watson* v. *Stever*, 25 Mich. 386, *assumpsit* was brought to recover the value of logs which Watson had taken possession of, claiming to have bought them of third persons. The circuit judge permitted a recovery, and this court said that "there are not wanting decisions which support the ruling," and a number of cases are cited in a note to that case where recovery in *assumpsit* was permitted, *although the defendant had not sold the property*. But it was held in the case cited that *assumpsit* would not lie, as the defendant "*was not shown to have sold any of the logs.*" The court said, however:

"If one has taken possession of property, and sold or disposed of it, and received money or money's worth therefor, the owner is not compellable to treat him as a wrong-doer, but may affirm the sale as made on his behalf, and demand in this form of action the benefit of the transaction. But we cannot safely say the law will go very much further than this in implying a promise, where the circumstances repel all implication of a promise in fact. Damages for a trespass are not, in general, recoverable in *assumpsit*; and, in the case of the taking of personal property, it is generally held essential that a sale by the defendant should be shown."

The statement of the rule is supported by the citation of many authorities. The distinction which apparently is sought to be drawn is that, where there is the conversion

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of property which the defendant had in his possession by virtue of contract relations between himself and the plaintiff, *assumpsit* will lie, and recovery may be had upon the common counts; but that, where the taking is in the first instance tortious, such is not the case, and the tort must be alleged. If it be conceded that under our decisions such allegations are necessary where there has been no sale, we think that cases of conversion by sale may be distinguished, although possession was acquired through trespass. In this case, for instance, there are two technical wrongs: *First*, in committing the trespass and removing the timber; *second*, the sale of timber, which, by the act of severing, though wrongful, became personalty. Until severed, it was not subject to conversion, and wherever it might be moved to the conversion might be charged. See *Greeley* v. *Stilson*, 27 Mich. 153. It did not become the property of the defendant by reason of his unlawful cutting, and if the plaintiff chose to forego the right to sue for the injury to the land, and to bring an action for the value of the personal property converted, we see no reason why such action might not be the same as though the wrongful conversion had not accompanied or grown out of another wrong; *e. g.*, a trespass. The case of *Watson* v. *Stever*, *supra*, while recognizing the fact that damages for the trespass may not be recovered in *assumpsit*, clearly indicates that money received for personal property taken unlawfully and sold may be recovered upon the theory that the law implies a promise to pay to the owner the money received for his property. The difficulty with the defendant's contention is that he insists on assuming that this is an action brought to recover damages for a trespass, which it is not, but is an action brought to recover money which the law regards as received for the use and benefit of the plaintiff, because it is the purchase price of his property.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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## *In re* ALBERS' PETITION.

1. VACATION OF STREETS—CONSENT OF CITY.
   The power of the courts to vacate a city street upon petition of the abutting land owners is not necessarily subject to the acquiescence of the city authorities. It should, however, when opposed by them, be sparingly exercised.
2. SAME—STATUTES—LEGISLATIVE AND JUDICIAL RECOGNITION.
   Any question as to whether chapter 32, 1 How. Stat., providing for "the recording of town plats, and for vacating the same," is applicable to city plats as well, has been settled in the affirmative by legislative and judicial recognition.
3. SAME—TITLE—COMPENSATION.
   A city has no proprietary interest in the public streets which entitles it to compensation when a street is vacated on petition of the abutting owners.
4. SAME—COMMON COUNCIL—JURISDICTION OF COURTS.
   The general jurisdiction of the circuit court over proceedings to vacate a city plat under chapter 32, 1 How. Stat., was not supplanted as to streets in the city of Grand Rapids by the provisions of the charter conferring certain general authority over streets upon the common council, or by the statute (2 How. Stat. § 6576) giving the superior court of Grand Rapids exclusive jurisdiction of all actions of a civil nature, at law or in equity, "against the city" or any of its officers.

*Certiorari* to Kent; Grove, J. Submitted June 15, 1897. Decided July 13, 1897.

Gerrit H. Albers and others petitioned the circuit court for the vacation of a portion of Trowbridge street, in the city of Grand Rapids. The petition was granted, and the city brings *certiorari*. Affirmed.

*Henry J. Felker*, city attorney (*Harvey Joslin*, of counsel), for appellant.

*Taggart, Knappen & Denison* and *Arthur R. Rood*, for appellees.

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HOOKER, J. We are asked to review, on *certiorari*, an order of the circuit court for the county of Kent vacating portions of Trowbridge street, in the city of Grand Rapids, upon petition of all land owners abutting on said portions of the street. The proceeding rests upon chapter 32, 1 How. Stat., especially section 1476 *et seq.* Several questions are raised by the brief of counsel who appear and defend upon behalf of the city, which is apparently unwilling that the street should be vacated.

While we are of the opinion that the power of vacating streets in opposition to the judgment and desire of the city authorities should be sparingly exercised, we cannot say that acquiescence by the city government is essential to the validity of such order. And we think there is nothing in the point that this statute does not apply to plats in cities, but only to town plats. The act mentions city plats in its first section (1 How. Stat. § 1473), and appears to relate to thickly-settled communities, such as villages and cities. As counsel for the petitioners suggest, judicial and legislative recognition seem to have set the matter at rest, as shown by the following authorities quoted from the brief of counsel: *City of Detroit* v. *Railroad Co.*, 23 Mich. 204, 206; Act No. 102, Pub. Acts 1891.

The law is attacked as being unconstitutional, for the reason that it permits the taking of property without compensation, though counsel support the contention with neither argument nor authority, further than to say that "the property proposed to be taken is valued at $6,000, which is sought to be donated to abutting owners." We understand it to be contended that this property belongs to the city, and that this order takes it from the city without compensation. Our understanding is that the city has no proprietary interest in the land, all of its authority over it growing out of its legal duty to maintain the public ways, which are placed in its charge. *City of Detroit* v. *Railway Co.*, 76 Mich. 421. Such interest in the land



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is in the abutting proprietors ordinarily, and is apparently so in this instance, and by the express provision of the statute their rights are recognized. This statute has been applied in many cases, and its constitutionality does not appear to have been questioned.

The next proposition relied upon is that the common council, or at furthest the superior court of Grand Rapids, and not the circuit court, has jurisdiction of proceedings to vacate streets in that city. We are surprised that subdivision 39 of section 10 of title 3 of the charter of Grand Rapids (Act No. 444, Local Acts 1895) should be quoted as giving the council authority "to establish, construct, maintain, repair, enlarge, and discontinue streets," etc. It reads as follows: "To establish, construct, maintain, repair, enlarge, and discontinue *within the highways*, streets, avenues, lanes, alleys, and public places of said city, *such bridges, culverts, sewers, drains, lateral drains, and sewers as the common council may see fit, with a view to the proper draining and sewerage of said city.*" We ought not to be called upon to verify quotations of laws, and, when quoted, expect that counsel will exercise care that they will not be so garbled as to change their obvious meaning. We think there is nothing in this or the other charter provisions cited that supplants the law conferring jurisdiction upon the courts in cases of this character. See *Case* v. *Frey*, 24 Mich. 251.

It remains to consider the alleged jurisdiction of the superior court. The following is the law supposed to divest the circuit court of jurisdiction:

"And said superior court shall have exclusive jurisdiction of all actions of a civil nature, at law or in equity, which may be brought by or against the board of education of said city, or by or against said city or any of its officers." Act No. 113, Pub. Acts 1881, § 13; 2 How. Stat. § 6576.

It is argued that this was an action against the city, as its object was to take from it a portion of a public street *owned and controlled by it* as a street. Technically,

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this was not an action at law or suit in chancery, but a statutory proceeding, under a power conferred upon circuit courts. And the city is not a necessary party. We have shown that the city does not own the land, and it is not suggested by the act that the city may appear and oppose the application, though we should hesitate to say that it might not be heard in opposition where any "reasonable objection to making such alteration or vacation" could be shown.

We think the circuit court had jurisdiction, and that its order should be affirmed. It is therefore so ordered.

The other Justices concurred.

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## STATE *v.* CITY OF DETROIT.

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1. PERSONAL INJURIES—EVIDENCE—PHYSICAL CONDITIONS.
   Evidence that the plaintiff in an action for personal injuries had led the life of a common prostitute for five years prior to the time of receiving the injuries for which suit is brought is admissible, in connection with evidence that the physical conditions ascribed by plaintiff to the injuries commonly result from sexual excesses.

2. SAME—MARRIED WOMEN—DAMAGES—MEDICAL ATTENDANCE.
   In an action by a married woman for personal injuries, an instruction that the damages recoverable include the moneys necessarily paid for medicinal treatment and care is erroneous, in the absence of evidence that such expenditure was made from her individual estate.

Error to Wayne; Donovan, J. Submitted June 16, 1897. Decided July 13, 1897.

Case by Josephine State against the city of Detroit for personal injuries. Plaintiff died pending the trial, and the

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cause was revived in the name of her administrator, Thomas State. From a judgment for plaintiff, defendant brings error. Reversed.

*Arthur Webster* (*C. D. Joslyn*, of counsel), for appellant.

*B. T. Prentis*, for appellee.

MOORE, J. Plaintiff, as administrator, recovered a judgment against defendant for injuries received by Josephine State, which plaintiff claims resulted from a fall from a carriage because of a defective pavement. Defendant appeals.

It is the claim of the plaintiff that on the night of November 25, 1887, Josephine State was thrown from a carriage, and received injuries from which she never recovered, and which finally resulted in her becoming a physical and mental wreck. It was the claim of the defendant that if Mrs. State was hurt at all it was but slightly; that she fully recovered from her hurt, and was engaged in active business; and that the developments subsequent to the injury were not the result of the injury, but were the result of sexual excesses practiced by her prior to the injury. Dr. Orr, a witness for plaintiff, after describing the condition in which he found Mrs. State, and stating that her condition might be caused by a fall or an injury, on the cross-examination testified that such a condition might be caused by dissipation. Dr. Inglis testified that such a condition was very often the result of excesses, and especially of sexual excesses. The defendant then sought to show that deceased, prior to the injury, led the life of a common prostitute; that she led a fast life; and proposed to show the character of her life from 1882 to 1888. This testimony was excluded; we think, improperly. If the injuries received were caused by the fall, the plaintiff was entitled to recover from the city; but if Mrs. State's condition was brought about, not by the fall, but by the life she led, then her representative

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was not entitled to recover. The defendant was entitled to have the proof bearing upon that question submitted to the jury.

The deceased was a married woman living with her husband at the time of the injury. The bill of exceptions does not purport to return all of the testimony, and we do not know just what was shown as to who paid for medical attendance and nursing. Defendant asked the court to charge, "Plaintiff cannot recover for any moneys expended for medicine or nursing." The trial judge declined to give this request as drawn, but charged the jury, "Plaintiff cannot recover for any moneys expended for medicine or nursing,—that is, himself,—for any moneys that he (State) expended." Again, after explaining to the jury under what circumstances the plaintiff would be entitled to recover damages, the court said, "The damages in such cases include the moneys necessarily paid for medicinal treatment and care." This is not a correct statement of the law in relation to a claim for damages by a married woman, who is living with her husband, for medical services and nursing. See *Cousins* v. *Railway Co.*, 96 Mich. 390, and the many cases there cited.

Other errors are assigned, but, as they are not likely to occur again, it will not be necessary to discuss them.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

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## FINCH *v.* MODERN WOODMEN OF AMERICA.

1. MUTUAL BENEFIT SOCIETIES — APPLICATION FOR MEMBERSHIP — FALSE REPRESENTATIONS.
   To the question in an application for membership in a mutual benefit society, "Has any examining physician for a life-insurance company or order declined to recommend your application?" the applicant answered, "No." The answer was untrue. The application in terms made the truth of each answer a condition precedent to the validity of the certificate of insurance issued thereon, and neither the company nor its agent was advised of the falsity of the statement at the time the risk was accepted. *Held*, that the certificate was void.

2. SAME — COLLECTION OF ASSESSMENTS — WAIVER OF FORFEITURE.
   The collection of an assessment from a member of a mutual benefit society does not constitute a waiver by the society of a provision in the benefit certificate that it should be void if the statements contained in the application for membership were untrue, where the officers were not aware of any false statements when they accepted payment.

3. WITNESSES — MATTERS WITHIN KNOWLEDGE OF DECEDENT.
   The statute excluding testimony as to matters which, if true, were equally within the knowledge of deceased, does not apply to third persons not parties to the litigation.

Error to Marquette; Stone, J. Submitted June 16, 1897. Decided July 13, 1897.

*Assumpsit* by Jane Finch against the Modern Woodmen of America upon a benefit certificate. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*F. H. Peters* and *S. W. Shaull*, for appellant.

*J. G. Johnson*, for appellee.

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MOORE, J. The plaintiff is the beneficiary named in a certificate of insurance issued by the defendant, a mutual benefit association, upon the life of Loren C. Finch, her husband. The defendant interposed as a defense that the answers made in the application for insurance were untrue, and that, according to the terms of the contract, the certificate was void. The trial judge directed a verdict in favor of defendant. Plaintiff appeals.

Mr. Finch was a resident of Negaunee. He was solicited by Mr. Byrns, a deputy head consul of defendant, who was authorized to solicit members and to establish camps, to become a member of the camp at Ishpeming, three miles away. He made a written application, which was filled up by Mr. Byrns, and presented to the Ishpeming camp. The application was at once referred to a committee composed of men who knew Mr. Finch. They at once reported favorably. The camp voted favorably for his admission, and his application was referred to Dr. Andrus, the examining physician of the camp. Mr. Finch appeared for examination, and was examined at least once, probably twice, and perhaps three times. Dr. Andrus found traces of albumen in the urine, and came to the conclusion that Mr. Finch had Bright's disease, and testified that he so told Mr. Finch. It is claimed on the part of the plaintiff that in an interview between Mrs. Finch, Mr. Peters, her attorney, and Dr. Andrus, the doctor informed them that he saw Mr. Finch but once, and made a partial examination of him. Just what occurred after the examination made by Dr. Andrus on the part of the Ishpeming camp in relation to this examination is not very clearly disclosed. The record which contains the names of rejected applicants does not contain the name of Mr. Finch. The card containing his application is in possession of the camp, and is indorsed with the action of the committee, the result of the balloting, and has written upon it in pencil the word "Rejected." This is in the handwriting of Mr. Rowley, who was then the secretary of the camp. When it was written does not

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appear. A little later, Mr. Byrns organized a camp at Negaunee. April 30, 1894, Mr. Finch made application to become a charter member at the solicitation of Mr. Byrns. His application was filled out by Mr. Byrns. He was examined by the local camp physician, who had known him for some time. His urine was examined. The camp physician regarded him as a good risk, and so reported him. A certificate of insurance was issued to him. He became a member of the Negaunee camp. In the following winter he had la grippe, but seemed to recover from it in the spring, so that he was about his work. Later he was taken ill, and November 24, 1895, died from Bright's disease, or heart trouble, or both.

The record discloses that, after Mr. Finch became a member of the Negaunee camp, Dr. Andrus had some correspondence with the head physician. Dr. Andrus testified:

"I have corresponded with the company in regard to this case, but not since the death. I don't remember the exact date I did correspond with the company before the death. I think it was in the fall of 1895. I corresponded with the head physician. I told him of the examination I had made, and of the result of it."

Mr. Finch, while a member of the Negaunee camp, paid all his dues, including an assessment made November 1, 1895. A number of the neighbors of Mr. Finch were sworn as witnesses, who testified to his appearing to be in excellent health in the spring of 1894 and prior thereto, and there is nothing in the record to show that he was not a desirable risk in the spring of 1894, except what resulted from the examination made by Dr. Andrus.

The application for membership, among other things, contained the following:

"*Question:* Do you understand the objects, organization, mode of government, and laws of this order, and particularly that part of the laws providing for the qualifications for and restrictions upon membership, and providing for the forfeiture of indemnity for untrue state-

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ments or answers in application, or failure to pay dues and assessments?

"*Answer:* Yes. * * * I am not now a member of this order. I have not within six months, and never more than three times, been rejected therein. I have never been expelled from any camp of this order, and am not now under suspension in any such camp.

"*Q.* If now a member, to what camp do you belong, and what is the amount of your benefit certificate?

"*A.* Not a member. * * * I am of sound body and mind, and free from disease or injury. I do hereby consent and agree that this application and the laws of this order shall form the sole basis of my admission to and membership in this order, and that any untrue or fraudulent statements or answers made to the camp physician, or any concealment of facts, intentional or otherwise, in this application, shall forfeit the rights of myself and my beneficiaries to all benefits and privileges therein or arising therefrom.

"*Q.* Have you ever been rejected by any life-insurance company or mutual benefit association? If so, give year and company.

"*A.* No.

"*Q.* Have you ever made application for life insurance or benefit, and withdrawn same before final action? If so, give year and company.

"*A.* No.

"*Q.* Has any examining physician for life-insurance company or order declined to recommend your application? If so, give name and address.

"*A.* No.

"*Q.* Have you ever had difficult, excessive, or scanty urination?

"*A.* No.

"*Q.* Or any disease of the urinary or genital organs?

"*A.* No.

"*Q.* Have you ever had any disease of the following-named organs, or any of the following-named diseases or symptoms: Kidney diseases, * * *?

"*A.* No.

"APPLICANT WILL PLEASE NOTE THIS CLAUSE:

"I have verified each of the foregoing answers and statements, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact

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literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers, and I hereby constitute and make the officers of the local camp and of the Modern Woodmen of America who have aided in making this application my agents for such purpose. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that, if any answer or statement in this application is not literally true, that my benefit certificate shall be void."

The benefit certificate contained the following provisions:

"This benefit certificate is issued and accepted only upon the following express warranties, conditions, and agreements: *First.* That the application of said Loren C. Finch and medical examination, which is made a part thereof, for membership in this order, and which is on file in the office of the head clerk, and is hereby referred to and made a part of this contract for benefit, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty, and to form the only basis of the liability of this order to such member and to his beneficiary or beneficiaries, the same as fully set forth in this benefit certificate. *Second.* That should said application, and each and every part thereof, not be literally true, then this benefit certificate shall, as to the member, his beneficiary or beneficiaries, be absolutely null and void."

Mr. Byrns was called as a witness, and testified, among other things, that, when he took Mr. Finch's application to become a charter member of the Negaunee camp, he knew he had already made an application for membership in the Ishpeming camp.

"I knew if that application had not been disposed of in some way he would not be eligible to membership in the

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Negaunee lodge. I knew if he had been rejected he would not be eligible.

"*Q.* Didn't you know that if he failed to complete his application he wouldn't be within six months?

"*A.* Well, no; I can't say that. I didn't consider that that was an application until he completed the application,—completed the blank,—the medical examination was completed, and I was advised of such completion. I knew something about what had become of his application in the Ishpeming lodge from what he had said to me himself. I understood from Mr. Finch that he had some trouble with the medical examiner. He didn't propose to complete his examination through him.

"*Q.* When you wrote the second application,—when you wrote the answer 'No' to this question: 'Have you ever made application for life insurance or benefit, and withdrawn the same before final action?' that answer was a false answer?

"*A.* No, I didn't consider it so. The way I interpreted that sentence was a benefit, or some application,—that is, completed that application blank, completed the filling of the application blank,—and then, learning after the application had been drawn that there was a possibility of his being rejected, of withdrawing it in that case, but not before the application had been completed; that is, entirely filled out and signed by the local physician. I wrote in the answer 'No' to the question, 'Has any examining physician of any life-insurance company or order declined to recommend your application?' He answered that himself. I wrote the answer in for him. He said he had not been rejected. I was soliciting applications for the Modern Woodmen of America. I was regularly commissioned deputy head consul. That business is to solicit applications, and what I did in that line was done for the company. That was my general business,—soliciting applications for them. I don't remember whether he took the application with him when he went to the physician at Ishpeming. I remember a conversation with Mr. Finch, in which he said he would not go to that physician again to be examined. I met him on one occasion, and asked him if he had been to Dr. Andrus for examination. He said he had been, and I asked him how it was, and he said he told him there was something the matter with his urine, and told him to come back again, and intimated to him that albumen was

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in his urine. He went back the second time, and I afterwards met Mr. Finch, and inquired if he had completed his examination. He said he had been there again, and he still found a trace of albumen in his urine, and asked him to come back again the third time. I said, 'You had better go back and complete your examination,' and he said—he made the remark—that he would not go back any more; he didn't propose to be fooled around in that way, and he wouldn't go back any more. I tried to prevail on him to go back, and he insisted that he wouldn't go back. I can't say exactly how long before he made application to the Negaunee lodge that this conversation took place. At all events, this first application and conversations were all prior to his second application at Negaunee. At the time I took this application in Negaunee, I knew something was the matter with the man's kidneys. He stated to me something was the matter; he had a trace of albumen. To the question in the application: 'Have you had any disease of the following-named organs, or any of the following-named diseases: Kidney disease,' I wrote in the answer, 'No.' I answered it in that way simply because it had not been determined that he had any trouble of that kind. He told me that Dr. Andrus had found a trace of albumen in the urine, but it had not been determined that he had any kidney disease. In every instance Mr. Finch gave me the answers I wrote down."

Cross-examination:

"In the conversation I had with Mr. Finch, he said he had been to see Dr. Andrus twice. He said Dr. Andrus wanted him to come again. He said he didn't propose to be fooled around by him, and refused to go back. I have nothing to do with the insurance part of these applications, except to solicit the applications and complete the preliminaries. What I mean by that is, take his application, and submit it in this original instance to the local camp. In the Negaunee instance I didn't make any card applications at all. I took his application and took all the applications on a charter blank, and then sent them to the local physician for examination. He was a charter member of Negaunee camp. I have nothing further to do with the insurance after they are turned over to the local camp physician, except to see that the beneficiary certificates are properly countersigned, signed by myself, and properly attested by the signature of the applicant

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prior to its being delivered to him. I do not pass on these applications in any way. I have no authority to say that the man's application is all right or otherwise. I have no authority to make contracts for the order. That is done by other agencies besides myself. My work is to solicit applications, and turn into the regular channel."

Redirect examination:

"The local physician has a right to reject the applicant. In the first place, the local physician can reject him; in the next place, the head physician can reject him. But, at all events, the local physician or head physician, and the local camp by ballot, are the ones that do the rejecting. And the deputy, in the event of his ascertaining that the moral fitness of the applicant is such as would make him ineligible, he can reject him. Deputy is the position I hold. If it is discovered that an applicant has perpetrated a fraud, or has given an untrue answer, the matter is referred to the board of directors of the head camp."

It is claimed by the plaintiff that Mr. Byrns had all the knowledge possessed by Mr. Finch, and that his knowledge must be deemed to be the knowledge of the defendant, and that it is now estopped from interposing the defense it seeks to make. While the record is clear that Dr. Andrus rejected Mr. Finch, it is not clear that the camp did, and, if there were no other questions involved, it might perhaps be a question for the jury whether or not the camp did, in fact, reject Mr. Finch. It is urged that Mr. Finch answered truly about the kidney difficulty, and told Mr. Byrns that traces of albumen were found, but that Mr. Byrns did not put down the answer truly; that Mr. Byrns was acting for the company in taking the application, and his knowledge is its knowledge. In all the cases brought to our attention, but one of them has been a case where the application for insurance contained provisions the same as are contained in this application. The case of *Baumgart* v. *Modern Woodmen*, 85 Wis. 546, was a case based upon a like application. It is claimed that the answers bind Mr. Finch, irrespective of the knowledge Mr. Byrns might have, because of the

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language of the application and the certificate. However, with our view of the case, it is not necessary to decide upon the effect of the failure of Mr. Byrns to record the answers to the questions just as they were given to him, or how far Mr. Finch was bound by the answers in the application, if Mr. Byrns had knowledge of the facts. In reply to the question, "Has any examining physician for a life-insurance company or order declined to recommend your application?" the answer was given, "No." The testimony shows that answer was not true. Dr. Andrus had declined to recommend Mr. Finch, and there is nothing to show that Mr. Finch so informed Mr. Byrns, or that he had knowledge of that fact. On the contrary, the testimony shows that Mr. Finch told him Dr. Andrus wanted Mr. Finch to call again for further examination, and the fair inference from the testimony is that he gave Mr. Byrns to understand that Dr. Andrus had not completed the examination. This was a material and important question. The company was entitled to have it truthfully answered. If the applicant had been rejected by an examining physician within two months, the company had a right to know it. And when it is not made to appear that either the company or its agent had knowledge of the fact, the untrue answer will avoid the policy. *Schwarzbach* v. *Protective Union*, 25 W. Va. 622 (52 Am. Rep. 227); *Brown* v. *Insurance Co.*, 65 Mich. 314 (8 Am. St. Rep. 894); 1 Bac. Ben. Soc. & Life Ins. §§ 218, 230.

It is said, however, that the testimony of Dr. Andrus was improperly admitted, because his testimony was equally within the knowledge of Mr. Finch. Dr. Andrus was not a party to the litigation. The provisions of the statute did not apply to him. His testimony was competent.

It is also urged that, after Mr. Finch became a member of the Negaunee camp, Dr. Andrus communicated to the head physician what facts he knew, and that afterwards an assessment was levied and paid, and that this was a

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waiver; citing Nibl. Acc. Ins. & Ben. Soc. 565. The trouble with this contention is that the record does not disclose that the officers of the company or its head physician had knowledge of the untrue statements made before any assessment was made, and payment thereof received by the defendant. Nibl. Acc. Ins. & Ben. Soc. 565; *Adreveno* v. *Life Ass'n*, 38 Fed. 806; *Matt* v. *Protective Soc.*, 70 Iowa, 455.

We discover no error in the result reached by the learned trial judge. The judgment is affirmed.

The other Justices concurred.

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## KIELDSEN *v.* BLODGETT.

113 655
143 455

1. APPEAL—CONFLICTING TESTIMONY.
   The decree of the circuit judge, based upon the testimony of a few witnesses, who disagreed as to the facts, was not disturbed.

2. HUSBAND AND WIFE—DEED—CONSIDERATION.
   A wife's conveyance of her property in payment of her husband's debt is supported by a sufficient consideration.

Appeal from Wexford; Aldrich, J. Submitted June 16, 1897. Decided July 13, 1897.

Bill by Flora A. Kieldsen, Minor T. Wheeler, and Nancy H. Bickhart against Delos A. Blodgett and another to set aside a deed. From a decree dismissing the bill, complainants appeal. Affirmed.

*Sawyer & Bishop* (*McIntyre & Wetmore*, of counsel), for complainants.

*E. E. Haskins*, for defendants.

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HOOKER, J. The complainants' bill was filed to cancel a deed admitted to bear the signature of Mrs. Kieldsen, upon the ground that it was signed under the supposition that it conveyed property of her husband, and not her separate property. She testified that she was ill in bed, and signed this deed and others for delivery in payment of her husband's debts, and that she did not hear them read, and that she made no request to be informed of the contents. In this she is corroborated by her mother, and disputed by the notary who took the acknowledgment, who testified that he stated to her what property was covered by each deed, and that this covered the premises mentioned. Her husband is dead. She subsequently sold the property to complainant Wheeler, and he sold it to complainant Bickhart. The deed of the defendants was placed upon record at once, but is said to have been overlooked by the purchasers; the Kieldsens being allowed to keep possession for a time under an arrangement made at the time defendants agreed to take the premises. It is one of those cases where we cannot be sure of doing justice, as all depends on the testimony of two or three witnesses, who are not agreed upon the facts. Under these circumstances, as we have frequently held, we should not disturb the decree made by the circuit judge, who heard the testimony. We have no doubt of the power of a married woman to convey her property in payment of her husband's debt, and that such conveyance has a sufficient consideration. The legal questions raised are "old straw," which has been threshed over and over again, and call for no special notice.

The decree of the circuit court is affirmed, with costs.

GRANT, MONTGOMERY, and MOORE, JJ., concurred. LONG, C. J., did not sit.

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## GRAY v. CITY OF DETROIT.[1]

TAXES—CERTIFICATE OF TREASURER—WHEN BINDING UPON CITY.

A city whose treasurer is authorized, but not required, to sell and transfer to any person who shall pay the tax or assessment, with costs and charges, all of the interest of the city in unredeemed land bid in by the city, does not lose its interest in land purchased at a tax sale, by an offer of a prospective mortgagee of the land, on behalf of the owner, to pay to the treasurer all the taxes due thereon; nor is it affected by the omission of such sales from a statement by the treasurer purporting to show the entire amount of unpaid taxes, upon which the mortgagee relied in making the loan.

Appeal from Wayne; Lillibridge, J. Submitted June 16, 1897. Decided July 13, 1897.

Bill by William J. Gray and Robert T. Gray, copartners as Gray & Gray, and George L. Beecher and Luther S. Trowbridge, administrators of the estate of Luther Beecher, deceased, against the city of Detroit, to cancel certain tax sales. From a decree dismissing the bill on demurrer, complainants appeal. Affirmed.

*Gray & Gray*, for complainants.

*C. D. Joslyn*, for defendant.

HOOKER, J. In 1895 William J. Gray and Robert T. Gray were employed by the administrators of the estate of Luther Beecher to examine the title to certain real estate, upon which said administrators were about to, and afterwards did, loan the sum of $20,000. It was found that this land had been sold for taxes, and bid in by the city of Detroit. An offer to pay or purchase these tax bids was made to the clerk in the office of the city treas-

[1] Rehearing denied September 15, 1897.



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urer by Mr. Harvey, to whom the loan was to be made, who was informed that they were too busy in the office to give the matter attention at that particular time. The inconvenience of delay was explained, and it was then proposed by the person in charge of the office to make a statement showing the amount due on said tax sales or bids in the hands of the city. Such certificate was as follows:

"CITY TREASURER'S OFFICE.
"DETROIT, June 7, 1895.

"I hereby certify, according to the records of this office, that there are taxes to the amount of $1,367.40 unpaid to date.

"JOHN W. CORCORAN."

The matter was explained to the Grays by Harvey, and they, relying on this certificate, closed the transaction; retaining from the sum loaned a sufficient sum to pay the amount stated in the certificate, and the further sum of $289.66, to redeem from sale for taxes of 1894. It does not appear how Gray ascertained that this latter purchase was outstanding. The balance of the $20,000 was paid to Harvey. When the Grays went to redeem from the sales, it was found that there had been further sales, not included in the amount certified by the deputy treasurer. The mortgage was foreclosed, and a deficiency of $5,000 resulted, which cannot be collected from the mortgagors. This bill is filed to cancel the sales, and the amount involved is $975. The bill was demurred to upon two grounds: (1) That the complainants are not in privity with the acts of the treasurer; (2) that the city is not bound by the certificate of the treasurer.

The bill states that section 13, chap. 5, of the charter of Detroit, permits the common council to prescribe by ordinance or resolution "other duties" for the treasurer. Chapter 29 of the ordinances authorizes the treasurer to sell and transfer to any person who shall pay the tax or assessment, with costs and charges, all of the interest of the city to unredeemed land bid in by the city. It is further stated that by resolution dated April 2, 1866, the

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treasurer was empowered to cancel sales, when owners request it, on presentation and surrender of the certificate of sale, properly assigned, and that it has been the custom of the treasurer's office to cancel the sales, in all such cases, of land sold to the city, where the city still held title under any tax sale, upon full payment. From these various provisions and practices, counsel deduce the conclusion that: "So long as the title is in the city, the sale is open to redemption. The sale is in fact only an embryonic sale, and under such circumstances the sale is no sale until the title passes," and therefore, so long as the city retains its purchase, it is subject to redemption, and a tender divests the legal effect of the sale. This theory must rest upon the provisions quoted, none of which *require* the treasurer to sell or transfer the interest of the city, or to cancel sales. He is given *authority* to do so, and it is said to have been the custom; but it is not alleged that the citizen who wishes to pay or buy can compel acceptance of the tax, costs, and charges, and a transfer or cancellation, nor do these provisions appear to require it. No official duty is created by the provisions as stated in the bill. This deputy treasurer was under no obligation to accept payment at the time it was offered by Harvey or his agent, and his attempt to accommodate Mr. Harvey was an unofficial act, for which the city is not responsible. In *Hand* v. *Auditor General*, 112 Mich. 597, we held that an owner, who seasonably sought to pay his tax, and was prevented by misinformation received from the county treasurer, who was in duty bound to communicate the truth, and upon whose statement the owner had a right to rely and act, would be protected against a sale growing out of the officer's default. The officer in that case was acting within the line of his bounden duty, and his act was that of the State. The State was bound accordingly, and a subsequent refusal to issue a deed upon discovery of the situation was sustained. We think the distinction is plain.

The decree of the circuit court is affirmed.

The other Justices concurred.

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113 660
121 510
113 660
s72NW 6
130 22

## CITY OF SAGINAW *v.* SWIFT ELECTRIC LIGHT CO.

1. MUNICIPAL CORPORATIONS — ELECTRIC LIGHT COMPANIES — INSPECTION OF POLES.
   A city ordinance providing for a reasonable inspection of all poles used by an electric light company within the city, to ascertain whether the same are secure, and making the cost of such inspection a charge against the company, is valid, where the statute under which the company was organized gives to the municipal authorities the right to prescribe "reasonable regulations" for the conduct of its business.

2. SAME — ORDINANCES — UNREASONABLE PROVISIONS.
   But a charge of 50 cents per annum for each pole so inspected, when the actual cost of inspection is about five cents only, is unreasonable.

3. SAME — GRANT OF POWERS — RIGHT TO AMEND.
   A city cannot justify the imposition of unreasonable burdens upon an electric light company, to which it has granted by ordinance the right to erect its poles in the streets upon conditions stated, under the power reserved to it in a subsequent ordinance relating to such company to amend, alter, or repeal the latter ordinance.

Error to Saginaw; Wilber, J. Submitted June 6, 1897. Decided July 13, 1897.

*Assumpsit* by the city of Saginaw against the Swift Electric Light Company to recover an amount alleged to be due under an ordinance providing for an inspection by the city of the poles maintained by the defendant. From a judgment for plaintiff, defendant brings error. Reversed.

*Hanchett & Hanchett*, for appellant.

*E. L. Beach*, for appellee.

HOOKER, J. The defendant is an electric light company organized under the general statute (1 How. Stat.

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chap. 127), which gives it the right to do business under "such reasonable regulations as the municipal authorities may prescribe." On May 9, 1881, the common council gave this company authority to erect poles for carrying its wires, under the supervision of the street committee. On May 6, 1889, the council passed "An ordinance to regulate the putting up, taking down, maintaining, and repairing telegraph, telephone, and electric light poles and wires." Section 2 of the ordinance is as follows:

"The city shall have the right to use the upper 20 inches of all poles hereafter put up, to support its fire-alarm telegraph wires; and it may, when necessary, put alarm boxes upon them, and connect said wires therewith."

August 5, 1895, the council passed a general ordinance entitled "An ordinance to regulate the placing and putting up and taking down of electrical wires and cables, and the placing of conduits therefor, in the streets, alleys, and public spaces of the city of Saginaw." Section 19 of this ordinance reads as follows:

"The city of Saginaw shall cause all poles used and maintained and occupied by any person, company, or corporation for stringing or sustaining his or its electrical wires or cables in said city to be inspected once each year, to ascertain whether the same are secure, and maintained in accordance with this ordinance of said city; and such person, company, or corporation shall pay to said city for such inspection the sum of 50 cents per annum for each pole so maintained by him or it."

It appears from the agreed statement of facts that in pursuance of this section all the poles on the east side of the city of Saginaw were inspected by a man employed under the direction of the common council and the board of public works; that he inspected in all 3,072 poles, of which he found that 1,045 belonged to the defendant. He spent 66½ days doing this work, and received $2.25 a day for his wages. The total amount, then, that he received for his work, was $149.62. This would make the cost about five cents for each pole, so that the actual cost of inspecting the defendant's poles would be $52.25.

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It appeared further that the defendant has inspected its 1,045 poles in three days, and that two men go over the entire line every day, and inspect the poles and trim the lamps. There are lamps on 158 of the poles. The men who do this work are paid $55 a month, and it is a part of their work to inspect the poles and the lines each day. It appeared further that since the passage of the ordinance of May 6, 1889, the defendant has erected and maintained 150 new poles, and that since that date the city has used the top 20 inches of a number of these poles in accordance with the provisions of section 2 of that ordinance. This same provision was re-enacted in the ordinance of 1895, in section 3, appropriating 24 inches, instead of 20 inches, to the city. It appeared also that each year since the year 1890 the defendant has been assessed in the sum of $15,000 upon its real estate and the sum of $40,000 on its personal property, which includes the poles and wires of the company, and the company has paid these taxes each year to the city.

Two points are made in opposition to the judgment of the circuit court, both attacking the validity of the ordinance: (1) That the amount fixed for the inspection is unreasonable; (2) that the council has imposed a tax under the guise of providing for inspection.

When the public safety requires it, the legislature has power to impose burdens to secure immunity from danger, under the general police power, and it is customary to delegate the power in proper cases to municipal corporations. Prent. Police Powers, 14. In this case the statute expressly confides to the city the power to *regulate* the construction and maintenance of wires, etc. There is manifest propriety in this. If, as contended by counsel, it were clear that this provision was not designed to secure the safety and protect the public against dangers, or if it were clear that it was an attempt to raise revenue under a pretense, we should not hesitate to hold the ordinance invalid. The ordinance provides for nothing but an inspection of poles once a year to ascertain whether the

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same are secure, and maintained in accordance with the ordinance. While we think that it is proper for the city to make a reasonable inspection, and we are not prepared to say that this is not a reasonable one, there is no occasion for requiring the electric company to pay more than a sum sufficient to pay the reasonable cost of such inspection. The pole is in plain sight, may be easily ascended, if necessary, and an examination as to soundness below the surface cannot be difficult or expensive. We may take judicial notice of these things. In addition, the evidence shows that this inspection was actually made for $149.62,—about five cents per pole. We are of the opinion that the price fixed by the ordinance is unreasonable, providing as it does for a charge of over $1,500 for protection which actually is secured for one-tenth the sum, and which it is obvious may always be secured, so far as this ordinance undertakes to secure it, for much less than the rate fixed.

It is hinted that this ordinance is valid under the power reserved by the ordinance of May 6, 1889, viz., "The right to amend, alter, or repeal this ordinance is hereby expressly reserved." If by this counsel means to claim that there are no restrictions upon the power of the council to impose burdens upon this company, which, under its statutory authority, it has permitted to erect its plant and engage in its business, we cannot agree with him. The company has a right to exist and do business by virtue of the statute. It depends upon the city only for its right to lay, construct, and maintain its conduits for electricity through the streets, etc. This consent was given by the resolution of May 9, 1881, *the only qualification being that the poles should be erected under the supervision of the street committee.* On May 6, 1889, the council passed an ordinance regulating the setting of poles, and it is this ordinance which contains the reservation of power to amend, alter, or repeal. We do not feel called upon to discuss the question whether a power reserved in an original grant to alter, amend, or repeal makes valid

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any and all burdens that may be imposed upon the company or person accepting such grant, because no such *power was reserved* in this original grant. The consent contemplated by the statute was given, and the defendant had a right to erect its poles and carry on its business, subject to the right of the city under the statute to prescribe reasonable regulations. As already stated, we consider this an unreasonable one.

The judgment is reversed, with costs of both courts. No new trial is ordered.

The other Justices concurred.

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CARR *v.* BRICK.

113 664
141 505

LOG LIENS—TRESPASSERS—RES JUDICATA.

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156 132

While a mere trespasser is entitled to no lien upon logs for labor and expenses as against the owner, the latter cannot, in replevin for the logs, deny upon that ground the validity of a lien established in proceedings under 3 How. Stat. § 8427*e et seq.*, wherein he was served, appeared, and defended the action.

Error to Alpena; Kelley, J. Submitted June 16, 1897. Decided July 13, 1897.

Replevin by James O. Carr against William Brick. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

*J. D. Turnbull*, for appellant.

*Dafoe & Gustin*, for appellee.

MONTGOMERY, J. This is an action of replevin, brought by plaintiff in justice's court for the possession

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of 25,000 feet of hemlock and basswood logs. The case was appealed to the circuit court, where a judgment was directed for the defendant for the value of the logs. The defense interposed was that the defendant purchased the logs at a sale made upon an execution issuing from justice's court in a lien proceeding, brought under section 8427*e*, 3 How. Stat. The evidence shows that the defendant in this case asserted such a lien, that the writ was served upon the present plaintiff as owner of the logs, and that he appeared before the justice, and defended the action. Section 8427*f*, 3 How. Stat., provides that, if the defendant in said attachment is not the owner of the property described in the writ, the officer shall serve, on or before the return day, a copy of the attachment upon the owner, and section 8427*m* provides that the owner may appear and defend the action the same as if made a party originally. When these proceedings were offered in evidence, objection was made by plaintiff's attorney, but it was stated, in response to the court's questions, that there was no objection to any of the lien proceedings, except that they were irrelevant and incompetent, from the fact that the timber was cut by a trespasser, and that the lien claim was being enforced against the logs by a trespasser; and that there was no claim of any informality in the preliminaries, or in the form of the judgment, execution, etc.

Plaintiff's contention in the lower court and in this court is that a trespasser cannot acquire a lien for his work in cutting timber, and that therefore the justice had no jurisdiction to render a judgment fixing a lien upon these logs.

The first proposition may be readily conceded; but the jurisdiction of the justice of the peace was fixed by the affidavit, writ, and service had in the case pending before him. The very question that was tried before the justice of the peace in the first case was whether or not these logs were subject to a lien in favor of the claimant. Not only did the present plaintiff have the opportunity to try that

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question, but he actually did take part in the trial, and the determination was against him. An erroneous judgment is not necessarily a judgment rendered without jurisdiction. The first judgment was conclusive of the rights of the parties. See note to *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 784, 808; *Jacobson* v. *Miller*, 41 Mich. 90; *Barker* v. *Cleveland*, 19 Mich. 230.

Counsel relies upon *Pine Saw Logs* v. *Sias*, 43 Mich. 358; but in that case it did not appear that the real owner of the property was before the court. The court say: "There was no determination that Brown was the owner. The fact that he appeared as owner would not be conclusive upon that question." Furthermore, that case was a direct proceeding to review the decision of the trial court, determining that there was a lien upon the logs.

Counsel also cites authorities to establish the proposition that a trespasser, however innocent, can acquire no lien upon logs for labor and expenses as against the owner. There would be no hesitancy in accepting this proposition as correct if the question were open upon this record; but, as we have seen, the precise question tried before the justice in the first case was whether a lien existed upon the logs. That was determined, and determined for all time.

Judgment is affirmed.

The other Justices concurred.

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## *In re* BEECHER'S ESTATE.

118 667
s117 28
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141 426

ESTATES OF DECEDENTS—VESTED RIGHTS—STATUTES.

B. died intestate, being possessed of personal property of great value. His wife survived him one year, and upon her death left her share of the estate to be divided among several legatees. A contest over the will was compromised, the will being set aside, and the manner of distribution of the estate agreed upon. B., 21 years before his death, had taken a lease of certain real estate for 100 years. The lessor's estate agreed, after various negotiations, to sell their rights under the lease and the fee of the land for a lump sum. The probate judge, upon application of the administrator of B.'s estate, authorized the purchase, claiming power to enter the order under Act No. 11, Pub. Acts 1897, which provides that, in case any continuing claim shall be made against the estate of a deceased person for rent under a lease, the administrator may, by and with the consent of the probate judge, compromise the claim, and may, in effecting the compromise, if necessary and if so ordered by the judge of probate, purchase the real estate covered by the lease, in which case the property so purchased shall be disposed of and distributed as personalty. *Held*, that the enactment and application of the statute did not deprive the heirs of the wife of B. of rights vested under their agreement, even though the agreement contemplated a conversion into money of all personal property belonging to the estate.

Error to Wayne; Frazer, J. Submitted June 17, 1897. Decided July 13, 1897.

George L. Beecher and Luther S. Trowbridge, administrators of the estate of Luther Beecher, deceased, petitioned the probate court for leave to compromise a claim interposed against the estate for rent under a lease, by purchasing the premises described therein. The petition was granted by the probate court, and John Atkinson, administrator of the estate of Mary W. Beecher, deceased, and Charles H. Wilkins and others, legatees of said Mary

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W. Beecher, appealed to the circuit court. From a judgment for petitioners, the administrator and legatees bring error. Affirmed.

The following is a concise statement of the case, made by the administrators of the estate of Luther Beecher:

"Luther Beecher, in his lifetime, obtained from the estate of Eliza F. Biddle a lease of the Biddle House hotel property in Detroit, running for 100 years from July 1, 1871, with a provision for an extension for 100 years more, at the lessor's option. The lease fixed the exact rental for the first 10 years. For each succeeding period of 10 years the rental was to be determined as follows: The value of the building was estimated to be $100,000, and Mr. Beecher agreed to pay 5 per cent. of this sum, annually, to wit, $5,000, and also to pay 5 per cent. upon the appraised value of the land, as well as all taxes, insurance premiums, etc. For the current period of 10 years, the land was appraised at $100,000. The current rental, therefore, amounts to $10,000, and taxes, etc. Mr. Beecher also agreed to maintain buildings of the value of at least $100,000, and to carry insurance of that amount. At present the administrators are unable to procure more than $60,000 of insurance. The present expenses for the year, including rent, are about $16,000. There is no income from the property at the present time, and it is unlikely to be rented. The claim of the Biddle estate upon the lease was allowed by the commissioners on claims as a continuing liability, and is an existing incumbrance. The real estate of the Luther Beecher estate is subject to the lien of this claim, and a large part of the personal estate must be retained to meet the exigencies of the lease. The lease is a very serious obstacle to the final distribution of the estate. There have been various negotiations towards a settlement, which have eventuated into a proposition from the Biddle estate to sell their claim and the fee of the land for $250,000. The administrators, believing it wise, petitioned the probate court for leave to compromise on this basis. Their petition was granted, and the probate order was affirmed in the circuit court. Mr. Luther Beecher died in September, 1892, intestate, leaving about $300,000 of real estate and about $1,400,000 of personal estate. His heirs were his only child, George L. Beecher, born of his first wife, and his widow, Mary

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W. Beecher. The real estate descended entirely to his son; the personal estate went in equal shares to the son and the widow. In the spring of 1893 she died, leaving a will, under which, as it was modified by the circuit court, her estate passed in varying sums to her own relations, 23 in number. John Atkinson is the administrator of her estate, and as such takes no decided stand upon the issue, as two-fifths of the distributees of her estate desire an affirmance, and three-fifths oppose it. His own personal view is in favor of it. As Mr. George L. Beecher desires the compromise, there are about seven-tenths in favor of it."

The statute under which the court proceeded was passed and went into effect February 11, 1897. It was an amendment to section 5932, 3 How. Stat. The section, so amended, reads as follows, the amendment being printed in italics:

"If any person shall be liable as security for the deceased, or have any other claim against his estate which cannot be proved as a debt before the commissioners or allowed by them, the same may be presented, with the proper proof, to the probate court or to the commissioners, who shall state the same in their report, if such claim shall be presented to them; and in case such claim shall be made against such estate by reason of any bond or agreement of any kind in writing, signed by the deceased, and binding him to pay any certain sum or sums for the support of the claimant for the lifetime of such claimant (*or for a term of years*), *or to perform certain work for another, for the nonperformance of which his estate is liable, or binding deceased to pay any sums as rental during a lease*, the administrator of said estate, by and with the consent of such claimant and the approval of the judge of probate, may compromise and settle such claim in such manner as shall be just and shall be determined by said judge of probate or probate court, and the same so determined shall be paid as other debts of said deceased; *and the administrator, in effecting such compromise, is empowered, if necessary and if so ordered by the judge of probate, after such notice as he shall direct, to purchase the real estate covered by the lease, and, in case of the purchase of real estate as above provided, the same shall be treated as personal property in the hands of the executor or administrator,*

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*and disposed of and distributed as such. This act is ordered to take immediate effect.*" Act No. 11, Pub. Acts 1897.

The circuit court found that the probate court had the power to make the order under the act of February 11, 1897, and also under the law as it existed before the passage of that act.

*Henry A. Haigh*, for appellant John Atkinson.

*De Forest Paine*, for appellants Charles H. Wilkins and others.

*Edwin F. Conely* and *Orla B. Taylor*, for appellees Mary G. Wilkins and others.

*Gray & Gray*, for appellees administrators of Luther Beecher's estate.

GRANT, J. (*after stating the facts*). Three large estates are interested in this proceeding, and, unless the administrators are empowered to make a settlement under the order of the court, the estates must be kept open, at great expense, and probable loss, to the two Beecher estates, for an indefinite period. Two of the estates assent to the order. The administrator of Mrs. Beecher's estate assents so far as he can do so, and two-fifths of those interested in her estate have also assented. A contest was made over the will of Mrs. Beecher, which was finally compromised by all the legatees, her will set aside, and the estate agreed to be distributed under a judgment of the circuit court made by consent. This agreement, as embodied in the judgment, evidently contemplated a conversion of all the personal property into money, and a distribution thereof to the various parties interested. It is apparent, not only from the facts themselves as shown in the record, but also from the testimony of disinterested and experienced witnesses, that the order is for the best interests of all concerned.

The question presented is one simply of power. The learned counsel for the appellants contend that the rights of those interested in Mrs. Beecher's estate have become

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vested, that there was no power under the former law to make the order, and that the act under which it was made, if applied to this case, is retroactive. The law is not in dispute, and is correctly stated by counsel for appellants, as found in *Todd* v. *Boards of Election Com'rs*, 104 Mich. 478, and the many other authorities cited by them. The only difficulty is to be found in the application of the law. Undoubtedly, the appellants and the other parties interested in Mrs. Beecher's estate are entitled to have it distributed in accordance with the terms of their agreement. In this respect they technically may be said to have vested rights. Their right to possession or enjoyment is not vested, and may never be. The estate may be kept open, and several hundred thousand dollars' worth of property kept in the hands of the administrators at large expense for 74 years,—beyond the life of any of those interested. The statute authorizes a compromise of such claims, and the purchase of the real estate by the administrator, whenever the probate court shall find it for the best interests of all concerned to do so. The real estate so purchased is to be considered as personalty, and must be distributed as other personal property. The statute simply provides a remedy to meet such a state of affairs. It applies to an existing condition, and does not overturn or conflict with vested rights. It provides for a compromise and settlement of contingent claims against an estate, and in doing so authorizes the court to sanction a purchase of the leased land. It is simply changing some of the property in the hands of the administrators into other property, when such change shall be determined to be for the best interests of all parties. We think the amended act is applicable to this case, and that the court possessed the power to make the order. It is unnecessary to determine whether the power existed under the former statute.

The judgment is affirmed. Under the circumstances, we think no costs should be allowed.

The other Justices concurred.

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## DE GRAW *v.* EMORY.

TRIAL—WITNESSES—CROSS-EXAMINATION OF PARTIES.

One of two plaintiffs in replevin may be cross-examined as to his own understanding, and his co-plaintiff's admissions, concerning a material fact in the case.

Error to Grand Traverse; Corbett, J. Submitted June 17, 1897. Decided July 13, 1897.

Replevin by George Archie De Graw and another against John U. Emory. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Affirmed.

*Turner & Gates*, for appellants.

*Patchin & Loranger*, for appellee.

HOOKER, J. On May 4, 1892, L. K. Cleveland sold a portable sawmill to the plaintiffs for $1,500, for which he received five notes, of $300 each, conditioned that the title to said mill and machinery should not pass until these notes should be fully paid. He also took a chattel mortgage upon the property, in which, by mistake, his wife, Lottie A. Cleveland, was named as mortgagee. On May 4, 1894, there being then nearly $600 of the purchase price due and unpaid, with interest from the date of sale, Cleveland took possession of the property; and on September 22d it was sold upon notice of foreclosure, Mr. Cleveland bidding it in for $550. From that time until January 1, 1896, Mr. Cleveland had possession of the property, when he traded a portion of it to Frank Beardsley, and at the same time gave him the chattel mortgage and notes, informing him that $550 should be indorsed. Subsequently Mary E. Emory bought a portion of the prop-

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erty, and later her husband, the defendant, bought a portion of the property from Beardsley. Emory took all of the property so purchased by himself and wife to Old Mission, where he used it for sawmill purposes until the plaintiffs replevied it in this action. In January, 1896, the plaintiffs purchased from Beardsley, for $50, the outstanding notes, which, with the sum of $25 paid Cleveland, is all that they paid upon the purchase price of the mill, so far as we have been able to ascertain from the record. The court directed a verdict for the defendant, and, from an examination of the testimony, we think he was warranted in doing so.

Several assignments of error relate to rulings upon the introduction of testimony, but they require no discussion, as there is no legal question of importance involved. One of them will be noticed, as counsel seem to specially desire it. One of the plaintiffs admitted upon cross-examination that a part of the property had been removed before Mr. Cleveland took the mill into his possession. His testimony indicated that he had the articles in his own possession at one time, though at the time of the trial he said that he did not know where they were, and had not seen them for some time.

"*Q.* But they were taken away from there?
"*A.* I was told so; yes, sir.
"*Q.* Who told you? (Objection; incompetent. Objection overruled. Exception.)
"*A.* My brother told me he had them."

Again, the following occurred:

"*Q.* As a matter of fact, you had given up possession of that mill after the sale, had you not?
"*A.* No, sir.
"*Q.* You hadn't?
"*A.* No, sir.
"*Q.* Then explain to the jury how you came to take that machinery away from there.
"*A.* Because we saw a notice that it was going to be sold. I didn't want to lose everything.



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"*Q.* Then you considered you had lost the mill, did you, after that sale?

"*A.* We considered we were liable to lose it. (Question repeated.)

"*A.* No, sir.

"*Q.* What did you consider?

"*A.* We considered we would have to try it and see.

"*Mr. Turner:* We object to what he considered; immaterial.

"*Court:* Well, he has answered it. I will not rule it out.

"*Mr. Turner:* We don't care to have it ruled out.

"*Q.* When did you first consider you had any interest in the mill after this sale under the chattel mortgage?

"*Mr. Turner:* We object as immaterial what he considered.

"*Court:* You may answer.

"*Mr. Turner:* Note an exception.

"*A.* Why, I never considered that I hadn't any interest in it."

Counsel say in relation to this ruling:

"It was clearly inadmissible to allow witness, against the objection and exception of plaintiffs' counsel, to testify what somebody told him, and also what he considered. We do not know of any rule of law that will allow a witness, against objection, to testify about what he considered in his own mind, as *no one could possibly refute such speculation by competent testimony.* This was certainly error, and would not be allowed in any court. We would like to have the court, if this is not error, show us the difference between the court's allowing witness to testify as to what he considered and what he thought, contained in the above assignments of error, and the case of *Lemon* v. *Railway Co.*, 59 Mich. 623. Plaintiff's counsel was permitted to ask the plaintiff this question: '*Q.* Now, Mr. Lemon, you may state to the jury whether, if those cattle-guards had been there on the track,—cattle passes fixed,—whether those sheep would have got down to where they were killed.' The court held in that case that the question was clearly improper, the fact inquired after was entirely *problematical*, and the question called for a conclusion of the witness upon facts concerning which it was the province of the jury, and not the witness, to draw all proper and necessary inferences."

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The distinction is to us obvious, and it is the difference between allowing the plaintiff, upon questions by his own attorney, to answer a problematical question, and, to an extent, be the judge of fact in his own case, which the jury alone should be, and permitting opposing counsel to draw from a party his own understanding, and his brother's and co-plaintiff's admissions, concerning a fact in the case.

The judgment is affirmed.

The other Justices concurred.

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## MURFIN v. DETROIT & ERIN PLANK-ROAD CO.

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TOLL ROADS—BICYCLES—CONSTRUCTION OF STATUTE.

A plank-road company incorporated under the general act of 1848 (1 How. Stat. chap. 96), and having the right, under section 17 of the act (1 How. Stat. § 3582), to exact tolls from persons traveling on the road in a specified sum "for every vehicle, sled, sleigh, or carriage drawn by animals," has no authority to require toll of a bicyclist.

Error to Wayne; Steere, J., presiding. Submitted June 17, 1897. Decided July 13, 1897.

Case by James O. Murfin against the Detroit & Erin Plank-Road Company for preventing plaintiff from riding a bicycle upon defendant's road without the payment of toll. From a judgment for plaintiff, defendant brings error. Affirmed.

*Gray & Gray* (*Charles M. Swift*, of counsel), for appellant.

*Griffin, Clark & Russell*, for appellee.

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HOOKER, J. This is an action brought against a toll-road company for stopping the plaintiff at defendant's toll-gate, and preventing him from proceeding to ride a bicycle upon its road without the payment of toll. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff.

The only question submitted is that of the right of the defendant to charge toll for the use of its road by persons riding bicycles. The rights of the defendant are statutory, and its right to charge toll is to be determined by section 3582, 1 How. Stat., viz.:

"Whenever any such company shall have completed their road, or any five consecutive miles thereof, the directors thereof may erect toll-gates, and exact tolls from persons traveling on their road, for so much as may be completed, at a rate not exceeding two cents per mile for any vehicle or carriage drawn by two animals, and one cent per mile for every sled or sleigh so drawn, and, if drawn by more than two animals, three-quarters of a cent per mile for every additional animal; for every vehicle, sled, sleigh, or carriage drawn by one animal, one cent a mile; for every score of sheep or swine, half a cent a mile; for every score of neat cattle, two cents a mile; and for every horse and rider, or led horse, one cent a mile. Such toll-gates so to be erected by such company may be as many in number, and located at such points, as such company may deem necessary."

If we could construe this statute as giving a right to collect tolls from all persons who travel the road, there would be little difficulty in holding that bicycles (which we held to be vehicles in *Myers* v. *Hinds*, 110 Mich. 300) are subject to toll, for we may take judicial notice that a good highway is as essential to their use as to that of any other vehicle. There is nothing in this act that gives the right to charge toll against pedestrians, and we have never heard it claimed that such charges were made. Nor have we known of toll being charged for wheelbarrows, or carts, or hand sleds, or baby carriages propelled by human agency, though a good road is as essential to these as to bicycles. If this question arose with reference to

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a four-wheeled vehicle propelled by steam or electricity, there would probably be little doubt of the right to charge and collect toll. It would seem to be covered by the case of *Detroit, etc., Plank-Road Co.* v. *Detroit Suburban R. Co.*, 103 Mich. 585, where it was held that the rights acquired under this act forbid the use of the highway for purposes inconsistent with the rights and franchises of the plank-road company. The use of two wheels instead of four, if propelled by a motor, as they are liable any day to be, would hardly suffice to distinguish them from the heavier and more cumbersome vehicle; and we hesitate to say that the courts could with propriety hold that a motor cycle could escape tolls under this statute, notwithstanding the fact that only vehicles drawn by animals are mentioned in the act.

We think, however, that a distinction may be made between vehicles propelled by man and those depending upon animal power or mechanical motors for propulsion, and that this would not do violence to the act, which has always been construed to permit the use of highways by persons who did not depend upon some means of conveyance besides their own powers of locomotion. The bicycle of today is propelled and managed by the feet and hands of the rider. It uses the traveled roadway only when it is the better part of the highway, and the pedestrian does the same. The projected electric railroad involved in the case of *Detroit, etc., Plank-Road Co.* v. *Detroit Suburban R. Co., supra*, was not expected to use the roadway constructed by the plank-road company, but one to be built for its exclusive use, and one adapted to no other kind of vehicle. It seems reasonable to say, therefore, that the case cannot be allowed to turn simply on the question whether the defendant's roadway is likely to be used by the bicycle, as that is not the controlling factor in the case of the electric road, which is forbidden, or the pedestrian, who is not forbidden, to travel any part of the road without paying toll. The bicycle is not subject to the payment of toll by the strict letter of

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the act. Neither is the motor cycle. Yet we incline to the opinion that payment of toll by the driver of the latter is within the spirit, while such payment by the user of the former is not, because of the apparent intention to confine the payment of toll to those who do not depend upon their own powers of locomotion for the propulsion of the vehicle used. This view seems to receive significant support in the fact that we find few cases where the question has arisen. The bicycle has been used as a road machine for a quarter of a century, and we cannot conceive of the users submitting to a general practice of charging toll without protest that would have led to an adjudication of the question. Furthermore, we have never heard that it was the practice of the companies to charge toll, and we have reason to believe that this company is no exception, but that the cause is here to ascertain whether the company may safely provide exceptional facilities for wheelmen, with the expectation of collecting toll.

But two cases where similar questions have arisen are cited by counsel. In *Geiger* v. *Turnpike Road*, 167 Pa. St. 582, a bicycle was held subject to toll, as a two-wheeled carriage, under a statute which gave the right to collect toll from—

"All and every person and persons using the said road, * * * and to stop any person driving any * * * sulky, chair, chaise, phaeton, cart, wagon, sleigh, sled, or other carriage of burthen or pleasure, * * * and for every other carriage of pleasure, under whatever name it may go, the like sums, according to the number of wheels and horses drawing the same." Act March 25, 1805, § 11.

The court held that this was a "carriage of burthen or pleasure;" and what is more significant, from the standpoint from which we view the case, is the view taken of the word "horses," as used in the statute. It is said that "the method of computation by wheels and horses is not the power to collect toll, which is expressly given. That

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is a mere limitation on the power. The demand must not exceed the sum specified for the animals and vehicles enumerated." This reasoning is at variance with our view, and it seems to us that it is at variance with immunity from tolls on the part of the pedestrian, who, as said of the bicyclist in that case, "has the same right as owners of carriages to insist that the highway shall be maintained in a reasonably safe condition of repair." A Pennsylvania statute is cited giving the bicyclist the right to use the highway, the same as any other vehicle, but we think it was declaratory of the common law merely; and, if it were not, it could hardly be held to affect the rights of a turnpike company under a charter granted half a century before practical bicycles were invented.

This question arose in England under a statute which gave the right to collect tolls as follows:

"For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-a-vis, barouche, phaeton, curricle, calash, chaise, chair, gig, whiskey, caravan, hearse, litter, or other such carriage, the sum of 6d.; for every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2d.; and for every carriage of whatever description, and for whatever purpose, which should be drawn or impelled, or set or kept in motion, by steam, or any other power or agency than being drawn by any horse or horses, or other beast or beasts of draught, any sum not exceeding 5s." 3 Wm. IV. chap. 55; *Williams* v. *Ellis*, 5 Q. B. Div. 175.

In a short opinion, the court held that a bicycle is not a carriage, within the meaning of the turnpike act; that carriages there referred to must be carriages *ejusdem generis* with the carriages previously specified, which, as the act imports, were carriages propelled otherwise than by human agency. We should hesitate to say that the right to charge tolls was limited to conveyances *ejusdem generis* with those drawn by animals, which alone seem to be mentioned in our act. Indeed, the case cited from 103 Mich. may be plausibly said to have settled that question; but we see no reason for refusing to apply the doctrine

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to the broader class of vehicles propelled by animals or some mechanical motor. It seems to us that this distinction will protect the plank-road companies from a use of their road by substitutes for those vehicles which the law contemplated should be charged for, and at the same time protect the pedestrian in his increased power of locomotion by the aid of the wheel.

This view accords with that of the learned circuit judge who tried the cause, and his judgment is affirmed.

MOORE, J., concurred with HOOKER, J. LONG, C. J., GRANT and MONTGOMERY, JJ., concurred in the result.

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## STEVENS *v.* YALE.

1. DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS.
   The damages for the breach of an agreement to advertise certain remedies over the name of a druggist, who gives an order for such remedies, are too speculative to permit of a recovery.

2. SAME—JUDGMENT—HARMLESS ERROR.
   A judgment for defendant in an action wherein a judgment for plaintiff for nominal damages would not have carried costs will not be reversed for failure to award such damages.

Error to Wayne; Frazer, J. Submitted June 17, 1897. Decided July 13, 1897.

*Assumpsit* by Fred D. Stevens and Frederick J. Todd, copartners, against Madame M. Yale, for the breach of a contract to advertise defendant's remedies as on sale at plaintiffs' store. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Affirmed.

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*Lehman Bros.* and *F. J. Riggs*, for appellants.

*Dickinson & Thurber* and *Benjamin S. Warren*, for appellee.

HOOKER, J. On February 5, 1894, the defendant, through her business manager, executed and delivered to the plaintiffs a writing, of which the following is a copy:

"DETROIT, MICH., February 5, 1894.

"I hereby agree, in consideration of receiving an order on my line of preparations from Messrs. Stevens & Todd, to add their names at bottom of all my advertisements in Detroit papers, stating a full line of my remedies can be had from them at both their stores, providing they continue to carry my full line in stock, and furthermore agree at any time to exchange for them any of my remedies which they find unsalable. The first order to amount to not less than $150.

"MADAME M. YALE.
"W. B. WILSON, Bus. Mngr."

The oral evidence showed that the plaintiffs were druggists, and the "remedies purchased were beautifiers for women," etc., upon which there was a profit of 50 per cent.; that, at the time of the execution and delivery of the writing, they gave an order for goods to the amount of $162.70, and had sold them since; that for a period of eight months, or thereabouts, their names appeared at the bottom of defendant's advertisements in Detroit newspapers, but, about eight months after the writing was made, she appointed Messrs. Williams, Davis, Brooks & Co. her wholesale agents at Detroit, and their names only appeared in the advertisements thereafter. After that time, at the request of the defendant, plaintiffs purchased from the wholesale agents in Detroit, finding it more convenient to do so. This action is brought to recover damages for defendant's failure to advertise over the plaintiffs' names. The judge directed a verdict for the defendant, holding—*First*, that there was a want of mutuality in the contract; and, *second*, that all damages attempted to be shown were speculative.

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We need not discuss the question of the validity of this contract. If it be treated as valid, and it be admitted that there was a breach of the contract by the defendant, the damages sought to be recovered were speculative. The injury suffered, if any, was a loss of such profits as would have resulted from advertising,—a matter of mere conjecture, depending upon the number who might read and act upon the advertisement. *Petrie* v. *Lane*, 58 Mich. 527; *Fitzsimmons* v. *Chapman*, 37 Mich. 139 (26 Am. Rep. 508); *McKinnon* v. *McEwan*, 48 Mich. 106 (42 Am. Rep. 458); *Allis* v. *McLean*, 48 Mich. 428; *John Hutchinson Manfg. Co.* v. *Pinch*, 91 Mich. 156; *Davis* v. *Davis*, 84 Mich. 324. We have held in several cases that loss of profits may be recovered where the loss of profits and their amount can be shown with certainty. But here the effect of this failure to advertise is most uncertain, and the circuit court was correct in holding that such damages were not recoverable.

Counsel for the plaintiffs urge that a new trial should be granted because the plaintiffs were entitled to nominal damages. This action was commenced in circuit court, and, under the statute, the plaintiffs would not be entitled to costs upon a judgment for nominal damages, and the judgment should not be reversed upon this ground. *Hickey* v. *Baird*, 9 Mich. 38; *Haven* v. *Manufacturing Co.*, 40 Mich. 290.

The judgment is affirmed.

The other Justices concurred.

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## SCHWINGSCHLEGL *v.* CITY OF MONROE.

1. PERSONAL INJURIES — SIDEWALKS — KNOWLEDGE OF DEFECT — CONTRIBUTORY NEGLIGENCE.

   The fact that the plaintiff in an action for injuries sustained by reason of a defective sidewalk was familiar with the unsafe condition of the walk does not preclude a recovery, if, in passing over the walk, he used such care and caution as a prudent man would ordinarily exercise in view of the danger.

2. SAME — DAMAGES — PRE-EXISTING CONDITIONS — INCREASE OF DISABILITY.

   Where, in an action for personal injuries, there is evidence that the conditions ascribed by plaintiff to such injuries were due in part to a pre-existing disease, it is the duty of the jury, if they find such theory to be established, to determine to what extent the pain, suffering, and disability were increased by reason of the injury, and to allow a reasonable compensation for such increase of pain, suffering, and disability, and for the expense incurred on account thereof.

Error to Monroe; Kinne, J. Submitted June 17, 1897. Decided July 13, 1897.

Case by Antoine Schwingschlegl against the city of Monroe for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

*A. B. Bragdon* and *C. A. Golden*, for appellant.

*Ira G. Humphrey* and *Willis Baldwin*, for appellee.

MOORE, J. The plaintiff, a deaf mute, recovered a judgment against defendant for injuries received upon a defective sidewalk. Defendant appeals, and assigns, among others, errors in relation to matters that have been before this court so often it would not be profitable to discuss them. The assignments of error we deem important will be discussed.

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The record shows that, in the winter of 1894, plaintiff slipped upon the ice. In March he slipped upon the sidewalk, and sprained his ankle so badly that he had it treated by a doctor. The evidence on the part of the plaintiff indicated that it was nearly, if not quite, well, when he received the injury, June 10th, for which this action is brought. In the winter, prior to the time of the accident, a sewer passing under the sidewalk was torn up. It was afterwards filled as well as could be done in winter weather, and some boards were laid upon the ground to keep people passing over the walk out of the mud. In the spring the earth settled under these boards from two to six inches. The boards were not nailed, but lay flat upon the earth, and sometimes the rain and sun had the effect to warp them so that one of them would roll under the person stepping upon it. There was abundant testimony to go to the jury showing that the municipal authorities had notice of the unsafe condition of the walk. The plaintiff passed over this walk frequently, and had passed over it early in the evening of the same day when the accident occurred. The injury was received about 10 o'clock in the evening. The defendant asked the court to take the case away from the jury for the reason that plaintiff was familiar with the walk, and knew its condition, and in passing over it was guilty of contributory negligence. The court declined to do this, but instructed the jury:

"It appears from the evidence in this case on the part of the plaintiff, and I think from his testimony, that he was familiar with the alleged unsafe condition of this sidewalk. That fact does not necessarily forbid or preclude a recovery for plaintiff, but it imposed upon him the obligation to use that knowledge and act upon that information in passing over that sidewalk. It placed upon him the duty to exercise more than ordinary care to go himself carefully and prudently in view of such recognized danger, and to use such reasonable care and caution as a prudent man would ordinarily exercise in view of such fact, and in view of all the circumstances which surrounded the plaintiff at the time of the alleged accident."

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We think the learned judge correctly stated the law in relation to this feature of the case. *Lowell* v. *Township of Watertown*, 58 Mich. 568; *Harris* v. *Township of Clinton*, 64 Mich. 447 (8 Am. St. Rep. 842); *Dundas* v. *City of Lansing*, 75 Mich. 499 (13 Am. St. Rep. 457); *Brezee* v. *Powers*, 80 Mich. 172; *Ashman* v. *Railroad Co.*, 90 Mich. 567; *Corcoran* v. *City of Detroit*, 95 Mich. 84; *Dittrich* v. *City of Detroit*, 98 Mich. 245; *Germaine* v. *City of Muskegon*, 105 Mich. 213; *Whoram* v. *Township of Argentine*, 112 Mich. 20.

It was the claim of the plaintiff that the injuries from which he suffered, and for which he was compelled to go to the hospital for treatment, were received from the fall, June 10, 1894. It was the claim of the defendant that plaintiff's condition did not result from the fall June 10th, but resulted from tuberculosis and the previous injuries. The defendant asked the court to take the case from the jury, arguing in the court below, as is argued here, that the testimony was undisputed that plaintiff's condition was the result of tuberculosis. The testimony is in dispute as to what caused the condition of the plaintiff; the testimony of defendant's witnesses indicating it was caused by tuberculosis and the previous hurt, while the testimony on the part of the plaintiff was that the development of the tuberculosis itself was caused by the injury of June 10th, and would not have resulted in the absence of that injury. The trial judge charged the jury that plaintiff could recover only for the injury of June 10th, and for the results of the injury. He then called the attention of the jury to the evidence in relation to the physical condition of the plaintiff, and the diseased condition called tuberculosis, and instructed the jury, if they found tuberculosis did not enter into his condition, they might disregard the evidence in relation to it.

"If, however, you find that it has entered into his condition, and does now, and is to a certain extent responsible for his present situation, then I instruct you as follows: Even though you should find that the plaintiff was

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suffering from a prior injury to the same ankle, and that it had not recovered at the time of the accident in question, that would not be a bar to his recovery in this case, but would affect the question of the amount of damages; that is, it would not affect the question of the damages, only it would be then your duty to determine from all the evidence what portion of his pain and suffering and disability was due to the injury in question, and to allow him a reasonable compensation for such increase of his pain and suffering, increased disability, and expense incurred on account thereof, by reason of this accident, and award him such damages as you think, under the evidence in this case, he is entitled to receive, and which would be a just and fair compensation therefor."

Taking the charge as an entirety, we do not think defendant has any occasion to complain of it.

Judgment is affirmed.

The other Justices concurred.

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## BAUDISTEL *v.* MICHIGAN CENTRAL RAILROAD CO.

MUNICIPAL CORPORATIONS—VACATION OF STREETS—NOTICE—JURISDICTION.

Act No. 353, Local Acts 1895, amendatory of the charter of the city of Jackson, which authorizes the vacation of any street or part of street, without application to the court, if all persons interested in the plat, or a "distinct part thereof," consent thereto, requires the consent of those persons only who have a legal right to compensation on the vacation of the street, and notice to others owning property on the plat is not essential to jurisdiction.

Appeal from Jackson; Lane, J., presiding. Submitted June 18, 1897. Decided July 13, 1897.

Bill by William Baudistel and others to restrain the Michigan Central Railroad Company from obstructing a street. From a decree dismissing the bill on demurrer, complainants appeal. Affirmed.

*Richard Price*, for complainants.

*William E. Ware* and *Parkinson & Campbell*, for defendant.

MONTGOMERY, J. The common council of the city of Jackson assumed to vacate that portion of Park avenue in said city which crossed the tracks of the defendant. This action was taken under the authority of that portion of Act No. 353, Local Acts 1895, which authorizes the vacation of any street or part of street without application to the court, provided all persons interested in the plat, or a *distinct part thereof*, shall file with the common council their consent to its vacation. The situation of the property, and the relation of the complainants to the subject-matter, may be seen by reference to the case of *Baudistel* v. *Recorder, etc., of City of Jackson*, 110 Mich. 357,

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where a full statement of facts appears. After the determination of that case, the complainants filed a bill in chancery to restrain the defendant from further obstructing that portion of the old street which the council had assumed to vacate. To this bill defendant demurred, and complainants appeal from a decree sustaining the demurrer.

Complainants own no land adjacent to that portion of the highway discontinued, and own none in the same block, nor were the means of ingress and egress to the property of complainants cut off by closing the street. There can be no doubt, therefore, that the legislature might authorize a vacation of that portion of the street without either compensation or notice to complainants. *Buhl* v. *Depot Co.*, 98 Mich. 596, and cases cited. We think the true construction of the act of 1895 requires consent by those having a legal right to compensation on the vacation of the street, and that notice to others owning property on the plat is not essential to jurisdiction. Complainants have no such interest as entitles them to maintain this bill. Reliance is placed upon *Horton* v. *Williams*, 99 Mich. 423. The distinction between a street and an alley running through a block, on which the property of complainant abuts, is not only apparent, but was specially pointed out in that case. The present case is ruled by *Buhl* v. *Depot Co.* See, also, *Kimball* v. *Homan*, 74 Mich. 699.

Decree affirmed.

The other Justices concurred.

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## GADD v. STONER.

1. WILLS—LIFE ESTATE WITH LIMITED POWER OF DISPOSAL—EXECUTORY DEVISE.

   A power of disposal annexed to a devise to testator's wife of all of his property, to be used "as she may desire and wish for and during the term of her natural life," will not necessarily defeat a devise in fee to take effect after the death of the wife, if it was the manifest intention of the testator that the power should only be exercised by the wife if required for her proper maintenance and support.

2. SAME—UNAUTHORIZED CONVEYANCE—GOOD FAITH.

   In the absence of an express limitation upon the power in the will itself, the law will affix that of good faith, and a conveyance made with the obvious purpose of subverting the intent of the testator will be ineffectual to pass a fee.

3. SAME—GRANTEE OF LIFE TENANT—LIEN FOR SUPPORT.

   The grantee under such a conveyance, who gives back an agreement to support the grantor during her lifetime, may take an estate for the life of the grantor, with a lien upon the land for all services that he may render under his agreement to support, less the value of the use of the land.

Appeal from Washtenaw; Kinne, J. Submitted June 18, 1897. Decided July 13, 1897.

Bill by William Gadd, executor, and others, against Mary E. Stoner and Laura G. Powell, to construe the will of Edward Y. Powell, deceased. From a decree for complainants, defendants appeal. Affirmed.

*A. F. & F. M. Freeman* (*B. M. Thompson*, of counsel), for complainants.

*A. J. Sawyer*, for defendants.

MONTGOMERY, J. On the 14th of March, 1891, Edward Y. Powell, then of the age of 71 years, made his



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last will and testament, two clauses of which are in controversy, *i. e.*, the second and fourth. So much of these clauses as bears on the question involved is as follows:

"*Second.* I hereby give, devise, and bequeath unto my beloved wife, Laura G. Powell, all of my property, both real and personal, and wheresoever situate, to use the same as she may desire and wish for and during her natural life, with full power and authority to grant and convey, in her own name, any part or portion thereof she may elect, desire, or wish, and the title so conveyed by her shall, for the purposes of the same, be perfect and free in the respective grantees or vendee, to all intents and purposes as though it were done by me, and for the purposes of the same shall be considered the absolute title of my said wife; and with full power to sell and buy any other personal property, in the place and stead of any other personal that I may die possessed of, with the avails thereof, that may to her seem necessary, or that she may wish; but any existing personal property or real estate, bought with the avails of other property belonging to me at my death, or other property substituted in its place and stead, and remaining at the death of my said wife, as that of which I may die seised or possessed, or for property bought and placed in its stead, seised or possessed by my said wife in her name, as bought with the avails of my said property, to descend and go, as hereafter expressed, after the death of my said wife, as any and all other property not used by my said wife under the power and authority herein expressed; with the further distinct understanding that any property so remaining at my death, belonging to me, shall be burdened with the care and for the maintenance and support of my said wife, in sickness and in health, for the purposes of maintaining a home, in name and in fact, as we have lived in the past, and according to our station in life, as well as the power and authority hereinbefore granted to my said wife, and at her death to give her a good Christian burial from the property so remaining, as hereinbefore stated."

"*Fourth.* After the performance of the bequests hereinbefore stated, and after the death of my said wife, I will, devise, and bequeath all my property, both real and personal, and wheresoever situate, unto the following named persons."

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Then follow specific bequests in detail.

Edward Y. Powell died on the 14th of May, 1893, and his will was admitted to probate on the 31st day of July, 1893. The property of the estate consisted of personal property, inventoried at $723.99, and a farm of 109 acres, inventoried at $4,462. On the 26th of August, 1893, the widow conveyed to Mary E. Stoner, a daughter of deceased, the farm, taking back an agreement for her support during life. The conveyance was of the fee. The complainants, as executor and legatees under the will, file this bill to have the will construed, and to have the effect of this conveyance declared. The circuit court construed the will as charging the estate with the support of Mrs. Powell, and as giving her the right to convey for that purpose, and decreed that, at the election of the defendants, the conveyance might be treated as creating a lien in favor of Mary E. Stoner for all services which she should render for that purpose, less the value of the use of the land. Defendants contended that the will vested in Mrs. Powell an absolute estate, which had been conveyed to Mrs. Stoner.

Defendants invoke the rule that when the fee is bequeathed, or a life estate created, with full and absolute power of alienation, the attempt to create a limited estate in favor of another devisee, by a subsequent clause in the same instrument, fails; and cite, to sustain this contention, 4 Kent, Comm. 270; *Dodson* v. *Sevars*, 52 N. J. Eq. 611; *McClellan* v. *Larchar*, 45 N. J. Eq. 17; *Howard* v. *Carusi*, 109 U. S. 725; *Bradley* v. *Carnes*, 94 Tenn. 27 (45 Am. St. Rep. 696); *Jones* v. *Jones*, 25 Mich. 401.

This rule is recognized, but it must be understood and applied in connection with such other rules as furnish aid in construing wills, and the cardinal rule is that the real intent and meaning of the testator, as expressed in the will, should be given effect, and that for this purpose all the clauses of the will are to be considered. *Bailey* v. *Bailey*, 25 Mich. 185. See, also, Schouler, Wills, §§ 466,

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467; *Smith* v. *Bell*, 6 Pet. 68; *Barnes* v. *Marshall*, 102 Mich. 248. It should also be noted that, in applying the rule contended for by defendants, a marked distinction exists between the case of an express bequest in fee and a case where the will creates a life estate with power to alienate. See this distinction noted in *Bradley* v. *Carnes*, *supra;* Schouler, Wills, § 559. In the latter case the test seems to be whether the will gives an unlimited, or only a modified, power of disposition in the first taker. If the former, it is treated as a conveyance in fee; if the latter, an executory devise may yet be given effect. In *Jackson* v. *Robins*, 16 Johns. 588, Chancellor Kent said:

"We may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

See, also, *Hinkle's Appeal*, 116 Pa. St. 498; *Cory* v. *Cory*, 37 N. J. Eq. 198; *Wetter* v. *Walker*, 62 Ga. 142; *Rhode Island Hospital Trust Co.* v. *Commercial Nat. Bank*, 14 R. I. 625; *Glover* v. *Reid*, 80 Mich. 230.

By the first part of clause 2, which defines the estate bequeathed, *i. e.*, "all of my property, both real and personal, and wheresoever situate, to use the same as she may desire and wish for and during the term of her natural life," it is altogether clear that but a life estate was created. See *Brant* v. *Iron Co.*, 93 U. S. 326. This being so, the question is whether the power which follows was intended to be unlimited, or limited to specific purposes. We think it was not unlimited. The testator has manifested an intention of charging his entire estate with the burden of the care of his wife, has given her a power of sale and reinvestment with that end in view,

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and has just as distinctly manifested the purpose that the residue shall go to certain named legatees.

It is also contended that, as the will contains a power to sell, and as Mrs. Powell has assumed to make conveyance, the court possesses no power to set aside the sale. In the same connection it is said that there is no limitation on the power of sale. But if the estate vested in her is less than a fee, certainly the limitation of good faith will be affixed by law. It is evident that the intent and purpose of the conveyance made to Mrs. Stoner was to subvert the intent of the testator.

We think the learned judge reached the correct conclusion, and his decree will be affirmed.

The other Justices concurred.

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## UNION STREET RAILWAY CO. *v.* SAGINAW CIRCUIT JUDGE.

1. STREET RAILWAYS—FORFEITURE OF FRANCHISE.
   Under 1 How. Stat. § 3548, providing that no street-railway company shall construct a railway in the streets of any municipality until it shall have accepted in writing the terms and conditions upon which it is permitted to use such streets, a city may properly reserve the right to forfeit the franchise of a company in case of its failure to pay the cost of paving between its tracks.[1]

2. SAME—INSOLVENCY.
   The inability of the company to make such payment affords no legal excuse for its default.

3. SAME—NECESSITY FOR JUDICIAL DETERMINATION.
   Where the franchise of a street-railway company provides that it may be forfeited by the city for a breach of condition, and the fact of a breach is undisputed, there is no necessity for the city to resort to the courts before proceeding to enforce the forfeiture by removing the tracks from the streets.

4. SAME—EQUITY—INJUNCTION.
   The circuit judge is justified, however large the interests involved, in refusing a preliminary injunction to restrain a city from enforcing a forfeiture of the franchise of a street-railway company, where it appears that the city is proceeding in exact accordance with the terms of its contract with the company.

*Mandamus* by the Union Street-Railway Company to compel Byron A. Snow, circuit judge of Saginaw county,

[1] The power of a city to impose conditions when giving consent to a street railway is considered in a note to *Galveston, etc., R. Co.* v. *Galveston,* (Tex.) 36 L. R. A. 33.

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to issue a preliminary injunction restraining the city of Saginaw from removing relator's tracks from the streets. Submitted June 28, 1897. Writ denied July 13, 1897.

The relator either owns or leases the entire street-railroad system of the city of Saginaw, and is, and has been for several years, operating the same. The common council of the city, claiming to act under its charter and contract with the relator, was proceeding by the appropriate resolution to declare the relator's franchise forfeited, and to take steps to enforce such forfeiture by removing its tracks from the streets. It thereupon filed a bill in chancery in the circuit court for the county of Saginaw, to restrain the city from taking the threatened action. It prayed for a preliminary injunction. The city answered, claiming the right to forfeit the franchise on account of the default of the relator in complying with the terms of its franchise. The court refused the preliminary injunction, and the purpose of this petition is to obtain the writ of *mandamus* to compel the chancery court to issue a preliminary injunction restraining the city from taking the threatened action until the final hearing of the cause.

*De Forest Paine* (*C. A. Kent*, of counsel), for relator.

*E. L. Beach* (*G. W. Weadock*, of counsel), for respondent.

GRANT, J. (*after stating the facts*). The facts are not in dispute. All the material facts alleged in the bill of complaint are admitted in the answer. The rights of the parties can therefore be determined upon bill and answer as effectually as could be done upon a hearing upon proofs.

The city and the relator entered into a mutual contract, evidenced by an ordinance, under which the relator obtained the right to lay its tracks upon and to use the

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streets under certain conditions. This contract is binding upon both parties, and, when either violates it, it must suffer the consequences agreed upon by the contract. Section 9 of the ordinance provides for laying, altering, and changing the tracks upon the streets, and, in regard to pavements, contains the following provision:

"When any street or avenue in which the track or tracks of said railways are laid shall be ordered paved, repaired, or otherwise permanently improved by the order of the common council, the board of public works shall, upon the completion thereof, make an estimate of the cost of so much pavement or other improvement as shall be included within the limits of said railway track or tracks, and also between the double tracks, and the amount so estimated, except the cost of paving at street intersections, shall be paid by the companies, their successors or assigns, to the city, one-fifth part in one, two, three, four, and five years thereafter, with interest at the same rate as borne by the 'Street Improvement Bonds' issued by the city for the making of such improvements. The cost of paving all street intersections shall be paid on demand; and the city shall have the right to recover the amount so estimated from said companies; and also the right, in case of default in the payment thereof, or of any judgment obtained therefor, to forfeit, after 30 days' notice, all rights and privileges of said companies, their successors and assigns."

Section 16 provides that if the relator—

"Shall willfully and unreasonably neglect to observe and obey such reasonable rules, orders, or regulations as the common council may, under the provisions of this ordinance, make, * * * the common council may, by a vote of two-thirds of the aldermen elect, revoke the privileges and authority hereby granted."

This section also provides for the service of a 30-day notice upon the relator to comply with its contract, before the city can proceed to forfeit. Under this ordinance, there is now due and unpaid from the relator to the city, for paving, for the years 1895 and 1896, $7,000 or over, and

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other large amounts still to grow due, and other streets ordered to be paved, for which the relator, under the ordinance, will become obligated to pay other amounts. The reason averred for this failure is that the relator is unable to pay. It alleges that its directors have advanced $80,000; that its earnings are not sufficient to meet its charges for running expenses, repairs, and interest.

The sole question, therefore, presented is: Does the insolvent condition of the company furnish a legal excuse for noncompliance with its contract, or, in other words, does the law permit it to use the streets of the city in violation of its contract, without paying the consideration agreed upon, simply because the investment has proved a losing one? If this question be answered against the relator, is it entitled to a preliminary injunction until the hearing?

It is true that, as alleged, the plant has cost about $500,000, and that it is mortgaged for $300,000 or more. This, however, does not affect the question. The rights of the parties are not to be determined by the amount involved. There is no doubt about the terms of the contract. Both parties entered into it with a full understanding that the situation now existing might arise, wherein the relator either could not or would not pay the amounts which from time to time it agreed to pay. As a consequence of such neglect or failure, it was solemnly agreed that the city might, through its common council, revoke its franchise, and remove its tracks from the streets. Inability to pay is no excuse. Can one party to a contract be relieved from its performance because he is unable to perform, and the other still be bound? To so hold would be to introduce a new element in determining contractual rights. The universal rule is that he who fails to perform, from whatever cause, must suffer the consequences which he has agreed to suffer. Corporations form no exceptions to the rule. Inability to pay may serve as an excuse when parties are arraigned for contempt of court

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for nonpayment, but it has never been held to furnish an excuse for violating the contract. *People* v. *Gravel-Road Co.*, 105 Mich. 9.

The case of *Shriver* v. *Bean*, 112 Mich. 508, has no application to this case. There the plaintiff, a city officer, was proceeding without the authority of the city, and at a time prohibited by law. In this case the city is proceeding in exact accordance with the terms of its contract, and it requires no citation of authorities to show that, when a party is proceeding in exact accordance with the terms of its contract, courts of equity will not interfere by their restraining process. Counsel for the city concede that, if the contract simply provided for a forfeiture, it would be compelled to proceed in the courts. This rule does not apply where the contract specifically provides that the municipality may declare the forfeiture. "The distinction between the two cases is that, if the franchise itself provides for forfeiture on breach of certain of its stipulations, there is no necessity for judicial determination that the breach warrants a forfeiture." Cros. Electricity, § 160. Here the breach is conceded, and the contract gives the city the option to forfeit. It has exercised this right. There is therefore nothing for a court to adjudicate. The relator's obligations to the city amount to about $35,000, of which $7,000 is due. It cannot pay. It does not offer to pay. Evidently, there is no expectation that it will be able to pay. It attempts to read into its contract that inability to pay shall relieve it from performance. This would result in making a contract in plain violation of the one made by the parties. This, courts cannot do. When a party confesses that he cannot perform his contract, equity will not inferfere to prevent the other party from enforcing his legal rights.

The contract entered into by these parties is fully sanctioned by the statute. 1 How. Stat. § 3548. This section provides that no street-railway company "shall construct any railway in the streets of any municipality until it

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shall have accepted in writing the terms and conditions upon which it is permitted to use such streets," etc. The following authorities fully sustain the city in its proposed action, and the respondent in refusing to issue the writ of injunction: *City of Belleville* v. *Citizens' Horse-Ry. Co.*, 152 Ill. 171; *Pacific R. Co.* v. *City of Leavenworth*, 1 Dill. 393; *People* v. *Gravel-Road Co.*, *supra*; *Spokane St. Ry. Co.* v. *City of Spokane Falls*, 46 Fed. 322. It is not claimed on behalf of the city that any of the property of the relator is forfeited to its use. It simply claims the right, under the contract, to order the relator to remove its property, and, upon its refusal, to remove it as an obstruction to the streets. The circuit court did not abuse its discretion in refusing to issue a preliminary injunction. This is not a case requiring a judicial finding, under the rule of *Flint, etc., Plank-Road Co.* v. *Woodhull*, 25 Mich. 99 (12 Am. Rep. 233), *City of Detroit* v. *Plank-Road Co.*, 43 Mich. 144, and *Shriver* v. *Bean*, *supra*.

The writ is denied.

LONG, C. J., MONTGOMERY and MOORE, JJ., concurred with GRANT, J.

HOOKER, J. I concur in the above. I also think the granting or denial of an injunction a matter of discretion, which is not reviewable.

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# INDEX.

ABANDONMENT OF SUIT—See LACHES.

ABATEMENT—See EJECTMENT (3–5).

"ABSCONDING" DEFINED—See ATTACHMENT (2).

ACCEPTANCE—See GUARANTY.

ACCIDENT INSURANCE.

An exception in an accident policy of death or injuries resulting directly or indirectly from poison extends to cases where the poison is administered through the mistake of a druggist or physician. *Early* v. *Standard Life & Accident Ins. Co.*, 58.

ACCORD AND SATISFACTION—See SETTLEMENT.

ACCOUNTING — See AMENDMENTS (2); ESTATES OF DECEDENTS (1); EXECUTORS AND ADMINISTRATORS (2–10).

ACT OF GOD—See LANDLORD AND TENANT (1).

ACTIONS—See JURISDICTION; MUNICIPAL CORPORATIONS (6).

ADMISSION OF SERVICE—See WRIT AND PROCESS.

ADMISSIONS—See EQUITY PRACTICE (1); GIFT (2).

ADULTERATION OF FOOD — See CONSTITUTIONAL LAW (1); CRIMINAL LAW (2).

ADVERSE POSSESSION.

Adverse possession of land need not, under 3 How. Stat. § 8698, be based upon color of title, nor need the possession have been hostile in the first instance, but it is sufficient if it continues for the requisite time, although the original entry was by consent of the owner and without shadow of title. *Ward* v. *Nestell*, 185.

See STATUTE OF LIMITATIONS (2); TENANCY IN COMMON; TRIAL (4).

AFFIDAVIT OF PUBLICATION—See TAXES (7, 8).

AGENCY—See PRINCIPAL AND AGENT.

ALIENATION OF AFFECTIONS—See HUSBAND AND WIFE (1, 2).

ALTERATION OF INSTRUMENTS—See BILLS AND NOTES (4).



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AMENDMENTS.

1. It is not error to permit the plaintiff to amend his declaration by adding a count thereto which sets forth no new cause of action, particularly where no claim of surprise is made by the defendant. *Minkley* v. *Township of Springwells*, 347.

2. An executor's final account, as presented for settlement in probate court, may, in furtherance of justice, be amended in the circuit court on appeal by adding omitted items. *Jackson* v. *Leech's Estate*, 391.

3. Plaintiff in an action to recover damages for fraudulent representations as to the value of a patent right was properly permitted to amend his declaration, after the testimony was closed and arguments had, to meet the proof in respect to a particular false representation to the effect that a certain prominent and wealthy person had purchased a small amount of territory for a large price. *Rathbun* v. *Parker*, 594.

See BASTARDY; MECHANICS' LIENS (3); PLEADING (1); REPLEVIN (2); RES JUDICATA (5).

ANIMALS—See DISTRAINED BEASTS; REPLEVIN (2).

APPEAL AND ERROR.

1. An agreement by counsel, without action of the court, that a demurrer to a declaration, which had been overruled, should stand overruled as to an amended declaration, presents no question for review on appeal, since parties cannot stipulate causes into the Supreme Court. *Hendrick* v. *Minor Lumber Co.*, 52.

2. An objection that the complainant in a foreclosure suit was not entitled to a personal decree for a deficiency, because, upon the trial, his counsel stated that they did not ask a personal decree, is not available on appeal, where it was not set up in the answer to the petition for such decree, nor claimed upon the hearing. *Belding* v. *Meloche*, 223.

3. Objections to portions of the charge upon which no error is assigned cannot be considered. *Shaw* v. *Township of Saline*, 342.

4. A judgment for the plaintiff upon verdict directed by the court will not be disturbed on appeal if his case at least entitled him to go to the jury, and the only assignment of error relates to the refusal of the court to direct a verdict for the defendant. *Michigan Mut. Life Ins. Co.* v. *Mather*, 357.

5. No presumption in favor of the correctness of the determination of the circuit judge on disputed questions of fact in a chancery case can attach upon appeal, when it appears that such decision was based in part upon inadmissible testimony. *Bailey* v. *Holden*, 402.

6. The conclusion of the circuit judge, who saw the witnesses, upon a direct issue of fact as to the ownership of a mortgage sought to be foreclosed, is entitled to great weight on appeal. *Hammond* v. *Rathbone*, 499.

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APPEAL AND ERROR—Continued.

7. The practice of settling chancery cases by including all of the testimony, immaterial and otherwise, and setting it forth by questions and answers, is condemned. *Id.*

8. A contention that the evidence in foreclosure proceedings shows the property to have been occupied by the mortgagor and his wife as a homestead, and therefore to be exempt from sale under a mortgage signed by the husband alone, will not be treated as abandoned because the discussion thereof is inadvertently omitted from defendant's original brief, if it is thereafter urged in a supplemental brief, and the omission explained. *Id.*

9. A writ of error will be dismissed on motion where no assignments of error accompanied the bill of exceptions at the time of its settlement, as required by Circuit Court Rule 47, par. (e). *Roush* v. *Darmstaetter*, 535.

10. A judgment refusing the probate of a will executed in triplicate will not be affirmed by the Supreme Court upon the point, raised for the first time in that court, that it is to be presumed that two of the three copies of the will, which were not accounted for on the trial, were destroyed by the testator, and that the will was thereby revoked. *Hurton* v. *Hurton*, 634.

11. The decree of the circuit judge, based upon the testimony of a few witnesses, who disagreed as to the facts, was not disturbed. *Kieldsen* v. *Blodgett*, 655.

12. A judgment for defendant in an action wherein a judgment for plaintiff for nominal damages would not have carried costs will not be reversed for failure to award such damages. *Stevens* v. *Yale*, 680.

See COSTS; ESTATES OF DECEDENTS (2, 3, 5); JURY (2); JUSTICES OF THE PEACE; PLEADING (1); RES JUDICATA (2); WILLS (2).

APPROACHES—See BRIDGES (4, 5); NEGLIGENCE (2, 3).

ARREST—See BAIL.

ASSAULT.

The Supreme Court declined to disturb a judgment for the defendant in an action to recover damages for injuries received in a street fight, the jury having found, upon competent evidence, that plaintiff was the assaulter, or was at least a willing participant in the affray. *White* v. *Whittal*, 493.

ASSIGNEE IN BANKRUPTCY—See BANKRUPTCY.

ASSIGNMENT OF LEASE—See LANDLORD AND TENANT (3).

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

An insolvent debtor deeded all of his real estate, except his homestead, to a firm to which he was indebted in a large amount, and at the same time executed to a member of the firm, as trustee for certain specified creditors, a chattel mort-

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ASSIGNMENTS FOR BENEFIT OF CREDITORS—Continued.

gage covering all of his personal property. This mortgage made no provision for the return of any surplus to the mortgagor. *Held*, that the instruments did not constitute an assignment for the benefit of creditors. *McMorran* v. *Moore*. 101.

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (3, 4, 9).

ASSUMPSIT.

1. One who takes an assignment of a mortgage in reliance upon the representation of the assignor that it is a first mortgage may rescind the agreement upon discovering the falsity of the representation, and recover back the amount paid for the assignment in an action for money had and received. *Cornell* v. *Crane*, 460.

2. One whose timber has been removed and sold by a trespasser may recover the proceeds in an action of *assumpsit*, as money received for his use, and the declaration need not aver the tort. *Nelson* v. *Kilbride*, 687.

See PLEADING (7).

ASSUMPTION OF RISK—See MASTER AND SERVANT (6).

ATTACHMENT.

1. Upon proceedings to dissolve an attachment, the plaintiff has the burden of showing, affirmatively, sufficient cause for issuing the writ, existing and continuing up to the time of the hearing of the application to dissolve. *McMorran* v. *Moore*, 101.

2. "Absconding," within the meaning of the attachment laws, means something more than a mere temporary absence for health. It involves the design to withdraw clandestinely, to hide or conceal one's self, for the purpose of avoiding legal proceedings. *Id.*

3. Although, to justify the issuance of a writ of attachment on the ground of a fraudulent disposition of property, the intent to defraud must have existed at the time the writ issued, the subsequent conduct of the parties may properly be considered, upon an application to dissolve the writ, for the purpose of throwing light upon such intent. *Id.*

4. Substituted service of a justice's writ of attachment, made on the sixth day before the return day of the writ, is valid, where the officer's return shows that he retained the writ in his hands, and made proper effort to obtain personal service, during the full time within which such service might lawfully be made; and *it seems*, further, that substituted service upon a prior date would be good under such circumstances. *Matthews* v. *Forslund*, 416.

See BAR; LOG-LIEN PROCEEDINGS.

ATTORNEY AND CLIENT—See WILLS (1).

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ATTORNEYS AT LAW.

1. The privilege of exemption of attorneys from arrest in certain cases, given by 2 How. Stat. § 7253, is not exclusive of the common-law privilege from service of process while attending court, or while going thereto or returning therefrom. *Hoffman* v. *Bay Circuit Judge*, 109.

2. An attorney at law is privileged from the service of process while attending upon the Supreme Court, and while going to the court, and returning therefrom to the county of his residence. *Id.*

3. In this case the attorney's protest against the dismissal of the appeal on petition of the parties to the litigation was overruled. *Buchanan* v. *Moore*, 555.

See CONTRACTS (4, 5).

ATTORNEY'S FEES—See EXECUTORS AND ADMINISTRATORS (3).

ATTORNMENT—See LANDLORD AND TENANT (3).

BAIL.

A defect in a bond given by one arrested on a *capias ad satisfaciendum*, in stating that the principal was in custody by virtue of a "*capias ad respondendum*," does not entitle the principal to a discharge from custody when surrendered by his bondsmen, where the mistake was due to the attorney of such principal, and was corrected, with the consent of all parties interested, as soon as it was discovered, and the bond treated as a valid one. *In re Friedrich*, 468.

BANKRUPTCY.

An assignee in bankruptcy can convey only such title as his assignor had at the time he was adjudged a bankrupt. *Lockwood* v. *Noble*, 418.

BANKS AND BANKING.

1. A bank cannot be compelled to use its assets to pay a tax on certain shares of its stock where it cannot reimburse itself against the stock, as provided by law. *St. Johns Nat. Bank* v. *Township of Bingham*, 203.

2. A *bona fide* purchaser of bank stock is not protected against a lien of the bank for an indebtedness due from the transferrer. *Oakland County Savings Bank* v. *State Bank of Carson City*, 284.

3. A bank cashier, by his declarations that the bank has no lien upon the stock of a shareholder, estops the bank, as against one who relies thereon to his detriment, from asserting a lien on the stock for an indebtedness then due it, notwithstanding that, under 3 How. Stat. § 3208a8, a transfer upon the books of the bank can be made only by the consent of the directors, when the holder is indebted to it on matured paper. *Id.*

See PARTNERSHIP (4); TAXES (4).



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BAR.

The recovery and collection of damages against a creditor for the seizure of property under a writ of attachment wrongfully sued out is a bar to the prosecution of a suit for the identical wrong against the estate of another creditor, whose attachment was in the officer's hands at the time of the levy for which recovery was had, and was levied upon the same property immediately thereafter. *Grimes* v. *Williams' Estate*, 450.

BASTARDY.

Bastardy proceedings are so far civil in their character that they come within the general statute of amendments. *People* v. *Cole*, 83.

See WITNESSES (1).

BENEVOLENT INSTITUTIONS—See TAXES (9).

BETTERMENTS—See EJECTMENT (1, 2); IMPROVEMENTS.

BICYCLES—See TOLL ROADS.

BILL OF LADING—See CARRIERS.

BILLS AND NOTES.

1. The dishonor of one of several notes secured by a mortgage puts a subsequent purchaser of the other notes upon inquiry, and he takes them subject to all the equities. *Lockwood* v. *Noble*, 418.

2. The execution and delivery of a note is sufficiently shown to permit of its being received in evidence where the payee produces the same in court, and calls a witness who testifies that he has frequently seen the alleged maker write her name, and that, in his opinion, the signature to the note is genuine. *Union Banking Co.* v. *Martin's Estate*, 521.

3. A note given to procure an extension of time for another upon his individual obligation is supported by a sufficient consideration. *Id.*

4. The signing of such a note by the debtor, for whose benefit the instrument was given, after it comes into the possession of the payee, is not a material alteration. *Id.*

See CORPORATIONS (2, 3); PARTNERSHIP (5); RECORDING LAWS (2); SETTLEMENT; STATUTE OF LIMITATIONS (1).

BOARD OF ESTIMATES—See MUNICIPAL CORPORATIONS (12).

BONA FIDE PURCHASER—See BANKS AND BANKING (2); BILLS AND NOTES (1).

BONDS—See BAIL; ESTATES OF DECEDENTS (3); REPLEVIN (2).

BRIDGES.

1. Plaintiff, while riding upon a traction engine, sustained injuries by reason of the collapse of a bridge, due to the decay of

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BRIDGES—Continued.

the stringers, which had been in use for 15 years. In an action against the township, persons who lived near the bridge testified that it had been in bad condition for some time; that it would shake when teams passed over it; and that they were afraid to drive across it with heavy loads. One witness testified that he had gone upon the bridge with the overseer of highways, and that it shook when they jumped upon it. This witness was contradicted by the overseer. The commissioner of highways testified that he went under the bridge two months before the accident, and made a careful examination, without finding any evidence of decay. *Held*, that there was evidence to go to the jury on the question of notice. *Aben* v. *Township of Ecorse*, 9.

2. The capacity of white pine for holding nails when sound, and its lasting qualities, as compared with other timber, may properly be shown in an action wherein defendant is claimed to have had constructive notice, by reason of the lapse of time, of the decay of a bridge built of such material. *Snyder* v. *City of Albion*, 275.

3. The decayed condition of the timbers in other parts of the bridge than that which collapsed may be shown for the same purpose. *Id.*

4. A graded approach to a bridge is a part thereof, and must be kept in reasonably safe condition by the corporation charged with the care of the bridge itself. *Shaw* v. *Township of Saline*, 342.

5. Thus, under 1 How. Stat. § 2853, making it the duty of the township in which an incorporated village is located to build, control, and keep in repair all bridges within the village limits in highways established by authority other than that of the village itself, the township, and not the village, has the duty of erecting and maintaining the railings and barriers necessary to render a graded approach to such a bridge reasonably safe for public travel. *Id.*

6. A township which permits the side railing of a bridge to become and remain out of repair is liable for injuries occasioned by its giving way and allowing a horse, which shies against it, to fall with the driver to the ground below, where the fright of the horse was due to the tipping of planks improperly nailed; but, if some object outside of the bridge was the proximate cause of the horse's taking fright, the township is not liable. *Minkley* v. *Township of Springwells*, 347.

7. A township is not negligent in constructing a bridge 20 feet long with one end a foot higher than the other, to conform to the formation of the adjacent land. *Perkins* v. *Township of Delaware*, 377.

8. The construction of a bridge 16 feet wide, 1 inch lower on one side than on the other, is not negligence. *Id.*

9. Whether the failure to maintain side railings on a bridge 20 feet long and 16 feet wide, one end of which was 1 foot

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BRIDGES—Continued.

lower and one side 1 inch lower than the other, constituted negligence, is a question for the jury. *Id.*

See EVIDENCE (1); MUNICIPAL CORPORATIONS (7); NEGLIGENCE (2, 3); PLEADING (3).

BUILDINGS—See FIXTURES; REPLEVIN (1).

BURDEN OF PROOF—See ATTACHMENT (1); FRAUD (1); MASTER AND SERVANT (5); SCHOOLS AND SCHOOL DISTRICTS (3); WILLS (2, 7, 8).

CANCELLATION OF RISK—See MUTUAL INSURANCE COMPANIES (1).

CAPIAS—See BAIL.

CARRIERS.

Evidence that a carrier received an unverified claim for damages from a shipper of stock, with a promise to give the matter prompt attention as soon as certain discrepancies were explained, and without any other objection than that the amount claimed was unreasonable, justifies the finding of a waiver of the requirement of its bill of lading that, in order to maintain a claim for damages to stock, a verified statement thereof must be served within five days after the removal of the stock from the cars. *Soper* v. *Pontiac, etc., R. Co.*, 443.

CASHIER, AUTHORITY OF—See BANKS AND BANKING (3).

CERTIORARI.

On *certiorari* to a justice of the peace, an amplification of the return, duly signed, accompanying the return proper and in no way inconsistent therewith, purporting to contain a minute of proofs offered and excluded, is entitled to the same consideration as if incorporated in the return. *McDougall* v. *Lamb*, 69.

CHARITABLE INSTITUTIONS—See TAXES (9).

CHATTEL MORTGAGES — See ASSIGNMENTS FOR BENEFIT OF CREDITORS; ESTOPPEL (3); FRAUDULENT CONVEYANCES (5); RES JUDICATA (1).

CHURCHES—See RELIGIOUS SOCIETIES.

CIRCUIT JUDGES—See COURTS.

CITY PLATS—See TOWN PLATS.

CLAIMS—See ESTATES OF DECEDENTS; LABOR DEBTS; MUNICIPAL CORPORATIONS (6).

CLASS LEGISLATION — See CONSTITUTIONAL LAW (3); EXEMPTIONS (1).

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COLLATERAL ATTACK—See TAXES (5).

COLOR OF TITLE—See ADVERSE POSSESSION; EJECTMENT (1).

COMMERCIAL PAPER—See BILLS AND NOTES.

COMMISSIONERS ON CLAIMS—See ESTATES OF DECEDENTS.

COMMISSIONS—See CUSTOM.

COMMON COUNTS—See ASSUMPSIT; PLEADING (7).

COMPLAINT—See CRIMINAL LAW (4).

COMPROMISE—See ESTATES OF DECEDENTS (7); SETTLEMENT.

CONDUCT OF COUNSEL—See CRIMINAL LAW (1); INTOXICATING LIQUORS (1); TRIAL (1, 6, 9).

CONSENT DECREE—See EQUITY PRACTICE (1).

CONSIDERATION.

Payment of part of the price, and a promise to pay the balance if an option to purchase should be exercised, are a sufficient consideration for a personal agreement by the seller's agent to return the payment with interest if the option should not be exercised. *White* v. *Taylor*, 543.

See BILLS AND NOTES (3); DEEDS (2); ESTOPPEL (3); FRAUDULENT CONVEYANCES (3, 6, 7); HUSBAND AND WIFE (4) PARTNERSHIP (2, 3); RECEIVERS (1).

CONSTITUTIONAL LAW.

1. It is competent for the legislature, under the police power, to provide for the protection of the public health by making it an offense punishable by fine and imprisonment to sell adulterated food or drink, irrespective of the seller's knowledge of the adulteration. *People* v. *Snowberger*, 86.

2. 2 How. Stat. § 7317, which authorizes the service of process, in certain classes of cases, in counties adjoining that in which the court issuing the process is held, does not, as applied to justices of the peace, operate as an unconstitutional enlargement of the jurisdiction of constitutional officers, in view of the express provision of the Constitution that the powers and duties of justices shall be defined and regulated by law. *O'Connell* v. *Menominee Bay Shore Lumber Co.*, 124.

3. Such statute, however, is invalid as class legislation, in that it gives special privileges to suitors upon specified classes of claims, and also excludes corporations, and, so far as the jurisdiction of justices of the peace is concerned, associations of individuals, from the benefit of its provisions. *Id.*

4. Section 18 of Act No. 408, Local Acts 1893, authorizing the judge of the recorder's court of Detroit to exclude from the court room, upon the trial of any cause wherein evidence of licentious, lascivious, degrading, or peculiarly immoral acts will probably be given, all persons except those necessarily

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CONSTITUTIONAL LAW—Continued.

in attendance, is unconstitutional as applied to a criminal case, in that it violates the right of the accused to a public trial. *People* v. *Yeager*, 228.

5. A justice of the peace in a city cannot be legislated out of office before the expiration of the term for which he was elected under article 6, § 17, of the Constitution, by an act reincorporating the city, and reducing the number of justices therein. *Gratopp* v. *Van Eps*, 590.

See COURTS; ESTATES of DECEDENTS (7); EXEMPTIONS (1).

CONTRACTS.

1. The refusal of a street-railway superintendent to obey the instructions of the president of the company, to whom the management of its affairs has been intrusted, constitutes a breach of his agreement to perform such duties as might be required of him by the company, and justifies his discharge. *Degen* v. *Manistee, etc., R. Co.*, 66.

2. The mere statement by a partner, after dissolution of the firm, to one of the partnership creditors, that he has agreed with his copartner to pay the firm's indebtedness, and the creditor's reply of "all right; pay as fast as you can," does not establish a privity between them as to the obligation of the former to pay the debt individually. *Motley* v. *Wickoff*, 231.

3. In an action upon a contract resting in parol, where the versions of the transaction were so different that the jury might properly have found that the minds of the parties never met on any contract, a charge which conveyed the idea that the minds of the parties did meet, either on the contract alleged in the declaration or the one testified to by defendant, was reversible error, although a requested instruction that, unless the minds of the parties met upon the alleged contract, there could be no recovery, was given in the same connection. *Shakespeare* v. *Baughman*, 551.

4. Evidence that the labor performed by plaintiff in obtaining the appointment of a guardian for an incompetent person was light in comparison with the amount which he alleges defendant agreed to pay for his services cannot be adduced by defendant to show an improbability that plaintiff's version of the agreement is correct, but the inquiry, if permissible at all, must be as to the value of the services *contemplated*, taking consideration of the contingencies. *Id.*

5. Evidence that the plaintiff in such action is a lawyer of limited practice and experience is inadmissible on the question of probability, where defendant does not profess to have known anything about plaintiff's qualifications at the time the alleged contract was made. *Id.*

See CONSIDERATION; CUSTOM; DAMAGES; GUARANTY; HOMESTEAD; MUNICIPAL CORPORATIONS (8); PARTNERSHIP (2, 3); PRINCIPAL AND AGENT; RECEIVERS (1); SCHOOLS AND SCHOOL DISTRICTS; STATUTE OF FRAUDS (3); WILLS (14).

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CONTRIBUTORY NEGLIGENCE.

1. Whether the owner of a horse, in permitting it to be driven unshod when the roads were slippery because of recent rains, was guilty of contributory negligence, precluding a recovery for damages resulting from its inability to keep its footing upon an inclined highway and bridge, which was unprotected by barriers, was a question for the jury, as was also the question of the negligence of the driver in not alighting before attempting to drive up the incline. *Perkins* v. *Township of Delaware*, 378.

2. One who, in the daytime, attempts to pass over paving stones which she sees scattered across the sidewalk, assumes the risk of injury. *Grandorf* v. *Detroit, etc., R. Co.*, 496.

3. Plaintiff's failure to jump from his wagon before colliding with an electric car did not constitute contributory negligence as a matter of law, it appearing that, by reason of his efforts, he came within a few inches of driving clear of the car; particularly as he was not bound to exercise the best judgment under the circumstances. *Bush* v. *St. Joseph, etc., R. Co.*, 513.

4. Running upon the sidewalk, in order to avoid being struck by a snowball, is not *per se* such an act of negligence as will bar a recovery for injuries received from falling into an unguarded excavation. *Penrose* v. *Fehr*, 517.

5. One who alights from a railroad train at a street crossed by the tracks of several different companies, and proceeds, without looking or listening, to cross the track of another road in front of an engine whose headlight is plainly visible, is guilty of such contributory negligence as will prevent a recovery for his death, although it does not appear that he knew of the existence of the second track. *Bannister* v. *Lake Shore, etc., R. Co.*, 530.

6. The fact that the plaintiff in an action for injuries sustained by reason of a defective sidewalk was familiar with the unsafe condition of the walk does not preclude a recovery, if, in passing over the walk, he used such care and caution as a prudent man would ordinarily exercise in view of the danger. *Schwingschlegl* v. *City of Monroe*, 683.

CONVERSION.

1. A lessee of land who is in full possession thereof, and of a house built thereon by him under an agreement that it should remain his personal property, cannot maintain an action against the lessor for the conversion of the house because of the sale of the land to a third party without reservation, although the purchaser requires of him an additional rent. *Heighes* v. *Dollarville Lumber Co.*, 518.

2. The fact that partnership property is wrongfully levied upon and advertised is not sufficient to establish a conversion thereof by the officer making the levy, but it must also appear, to render him liable in trover, that the partners have been deprived of the possession of the property, by removal

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CONVERSION—Continued.

or otherwise, under circumstances which show that the officer is legally chargeable with such deprivation. *Kunze* v. *Cox*, 546.

See PARTNERSHIP (8).

CORPORATIONS.

1. The act of Congress incorporating the Supreme Lodge Knights of Pythias did not confer upon such corporation an exclusive right to the use of the name "Knights of Pythias," since that name was already in use by an existing voluntary association. *Supreme Lodge K. of P.* v. *Improved Order K. of P.*, 133.

2. A note and mortgage given by a corporation cannot be defeated in the hands of a good-faith purchaser before dishonor, who took the same as the result of negotiations with the officers of the corporation, on the ground that the transaction out of which the securities grew was *ultra vires*. *Woodcock* v. *First Nat. Bank of Niles*, 236.

3. A judgment against a corporation upon its acceptance of a draft for the purchase price of goods sold to it under an arrangement with its treasurer that an accounting between it and the vendor should be had at stated intervals, and that 30, 60, and 90 day acceptances should be given and received for the amounts found due, is, in the absence of evidence that the accepted draft was itself received as payment, a judgment for goods, wares, and merchandise, within the meaning of the statute (1 How. Stat. § 3940) making stockholders individually liable on such judgments after execution against the corporation has been returned unsatisfied. *Kirkpatrick* v. *Mehalitch*, 631.

See FRAUDULENT CONVEYANCES (5); MUSICAL SOCIETIES; PRINCIPAL AND AGENT (2); PRINCIPAL AND SURETY; STATUTE OF LIMITATIONS (1), TAXES (9); TELEPHONE COMPANIES; TOLL ROADS; VOLUNTARY ASSOCIATIONS.

COSTS.

1. Upon affirmance in the Supreme Court of a decree dismissing a bill to enjoin the collection of a judgment, the defendants in which represented different interests, costs, including separate solicitor's fees, were awarded to each against the surety on the appeal bond as well as against the complainant. *Farmers' Fire Ins. Co.* v. *Johnston*, 426.

2. The decision of the circuit judge being sustained save for a single modification, the number of pages of record and briefs for which appellant was allowed costs of printing was limited to that reasonably necessary to present the question determined in his favor. *In re Brewster's Estate*, 561.

See REPLEVIN (1).

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COURTS.

Act No. 152, Pub. Acts 1895, which authorizes the governor, when business has accumulated in any of the circuit courts of the State beyond the capacity of the local judge properly to dispose of it, to designate a judge of some other circuit to hold court in the former circuit temporarily, is valid under article 6, § 11, of the Constitution, providing that the circuit judges may hold courts for each other, and shall do so when required by law. *In re Bromley's Estate*, 53.

COVENANTS.

1. In an action for breach of warranty in a deed, the taxable costs incurred by the plaintiff in defending an action of ejectment are properly included as a part of the damages, although they were not in fact taxed. *Webb* v. *Holt*, 338.

2. The plaintiff may show in such action that the title under which he was ousted was not derived from himself. *Id.*

3. Where the recovery is limited to the amount paid for the premises, with interest thereon and costs, the admission of evidence as to improvements is not reversible error. *Id.* 339.

4. A wife, though she joins in her husband's deed, is not liable on a covenant of warranty therein, and need not be joined as defendant in an action for breach thereof. *Id.*

CREDIBILITY OF WITNESS—See EVIDENCE (5).

CRIMINAL LAW.

1. Upon the trial of a druggist for an unlawful sale of intoxicating liquors, the prosecuting attorney offered to show that the complaining witness, who claimed to have procured the liquor, immediately thereafter related the circumstances to a third person, whom he proposed to call for the purpose of showing that the sale occurred at the time charged in the information. Upon objection to the statement of the proposed testimony in the presence of the jury, the court ruled that it was the right of counsel to state to the court what he proposed to prove, but that the jury should disregard his statement, and declared the testimony inadmissible for the reason that the name of the proposed witness was not indorsed on the information. The only testimony to support a conviction was that of the complaining witness; that of the respondent and of the only other person claimed to have been present being in direct denial. *Held*, that the remarks were, under the circumstances, prejudicial to the respondent. *People* v. *Abell*, 80.

2. Act No. 193, Pub. Acts 1895, prohibits the manufacture or sale of adulterated articles of food or drink, and prescribes what shall be deemed adulteration within the meaning of the act. Section 8 forbids any person from *knowingly* offering for sale cheese which is falsely labeled; this being the only case in which knowledge is expressly made an element of an offense designated by such statute. *Held*, that proof of guilty knowledge or intent is not essential to the conviction of one who sells adulterated food. *People* v. *Snowberger*, 86.

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CRIMINAL LAW—Continued.

3. The examination of witnesses preliminary to the issuance of a warrant in a case not cognizable by a justice of the peace need not be reduced to writing. *People* v. *Rush*, 539.

4. Where the warrant issued in such case recites the examination of the complaining witness on oath, but does not show to what he testified, it will be presumed that the evidence was sufficient to authorize the issuance of the warrant, although the written complaint purports to have been made on information and belief. *Id.*

See CONSTITUTIONAL LAW (1, 4); INTOXICATING LIQUORS; LARCENY; RAPE; STATUTES.

CROSS-BILL — See EQUITY PLEADING (1); MECHANICS' LIENS (3, 4).

CUSTOM.

A custom in the life-insurance business to allow general agents a permanent interest in the insurance secured by them in the form of a percentage on the renewal premiums does not affect or modify the provision of a contract which expressly limits commissions on business secured by the agent to the continuance of the agency. *Houghton* v. *Bradley*, 599.

CUTTING TIMBER—See TRESPASS.

DAMAGES.

The damages for the breach of an agreement to advertise certain remedies over the name of a druggist, who gives an order for such remedies, are too speculative to permit of a recovery. *Stevens* v. *Yale*, 680.

See APPEAL AND ERROR (12); COVENANTS (1, 3); LIBEL AND SLANDER (3–5); MARRIED WOMEN; PARTNERSHIP (1); PERSONAL INJURIES (2); REPLEVIN (1); SCHOOLS AND SCHOOL DISTRICTS (3); TRESPASS.

DANGEROUS PREMISES—See NEGLIGENCE (1).

DEATH OF PARTY—See EJECTMENT (4, 5).

DEATH OF WITNESS—See EVIDENCE (3).

DEBTOR AND CREDITOR—See ASSIGNMENTS FOR BENEFIT OF CREDITORS; ESTATES OF DECEDENTS; FRAUDULENT CONVEYANCES.

DEEDS.

1. Under 2 How. Stat. § 5685, making a certified transcript of the record of a deed sufficient proof of its execution and delivery, the original deed, with the certificate of record indorsed thereon, is admissible without preliminary proof. *Webb* v. *Holt*, 388.

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DEEDS—Continued.

2. A grantee under a deed by which he assumes, as a part of the consideration, the payment of one-third of the indebtedness of a certain business, may show by parol, in an action by him against his grantor to recover an excess of moneys so paid, that the debts which he assumed were agreed to amount to a certain sum, while in fact they exceeded it. *Clark* v. *Lowe*, 352.

See COVENANTS; FRAUD (5); STATUTE OF FRAUDS (3); TAXES (1).

DEFICIENCY—See APPEAL AND ERROR (2); VENDOR AND PURCHASER.

DEMURRER—See APPEAL AND ERROR (1).

DISCLOSURE—See GARNISHMENT (2, 3).

DISCONTINUANCE OF SUIT—See REPLEVIN (2); SETTLEMENT (1).

DISMISSAL OF APPEAL—See ATTORNEYS AT LAW (3).

DISSOLUTION OF ATTACHMENT—See ATTACHMENT (1, 3).

DISSOLUTION OF PARTNERSHIP—See PARTNERSHIP (2–5).

DISTRAINED BEASTS.

The owner of animals distrained *damage feasant* waives the written notice required by the statute, by trying to get the animals, after learning all the facts, before the expiration of the time for giving such notice, and while the person distraining them is proceeding to take steps under the statute. *Parks* v. *Kerstetter*, 520.

See REPLEVIN (2).

DRAINS.

Under section 6, chap. 6, of the drain law of 1885 (3 How. Stat. § 1740*f*6), providing that taxes assessed under such act shall be collected in the same manner as State and other general taxes, lands delinquent for drain taxes may be bid off in the name of the State, in a proper case, in accordance with the provisions of the general tax law, notwithstanding lands so bid to it are, by the terms of such law, held "for the use of the State, county, and town, in proportion to the amount due each," neither of which bodies has any pecuniary interest in drain taxes. *Hilton* v. *Dumphey*, 241.

DURESS—See PAYMENTS (1).

EDUCATIONAL INSTITUTIONS—See TAXES (9).

EJECTMENT.

1. A defendent in ejectment who, before the commencement of the action, entered upon the premises in good faith under color of title, painted the exterior of the house, shingled a portion of the roof, and moved some things into the house, is within 3 How. Stat. § 7836, providing for compensation for

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EJECTMENT—Continued.

improvements made by defendants in ejectment who shall have "occupied" the premises for a less time than six years under color of title and in good faith. *Jones* v. *Merrill*, 433.

2. Where the circumstances are such as to throw doubt upon defendant's good faith, the question is one for the jury. *Id.* 434.

3. A conveyance of the land by the plaintiff in ejectment does not operate to abate the suit, but it may still be prosecuted by the plaintiff or his representative, and a judgment in his favor will inure to the benefit of the grantee. *McKenzie* v. *A. P. Cook Co.*, 452.

4. The death of the plaintiff in ejectment does not abate the suit. *Id.*

5. The death of the defendant in ejectment abates the suit; but the statute of limitations does not run during the pendency of the suit, and under 2 How. Stat. § 8707, plaintiff may bring an action for the same cause at any time within one year after the suit is thus abated. *Id.*

See ELECTION OF REMEDIES (2); IMPROVEMENTS; JURISDICTION; LACHES.

ELECTION OF REMEDIES.

1. While it is true that a person is bound by an election between two inconsistent remedies, one having a meritorious claim, who mistakes his remedy, and attempts to enforce it in an inappropriate action, wherein no recovery can be had, is not precluded thereby from resorting to his proper remedy. *Sullivan* v. *Ross' Estate*, 311.

2. A defendant in ejectment who files a bill in equity to enjoin the prosecution of the suit, plaintiff consenting by his answer that the question of whose is the superior title may be transferred to that forum, cannot invoke the doctrine of election of remedies to defeat plaintiff's right to a decree. *McKenzie* v. *A. P. Cook Co.*, 452.

See PLEADING (5).

ELECTIONS—See MUNICIPAL CORPORATIONS (9).

ELECTRIC LIGHTING—See MUNICIPAL CORPORATIONS (8-11).

EMPLOYMENT—See CONTRACTS (1); SCHOOLS AND SCHOOL DISTRICTS.

EQUITY—See MISTAKE.

EQUITY JURISDICTION.

A bank cannot maintain a bill to restrain the prosecution of an action at law to recover a tax assessed against certain of its stock, on the ground that such stock was transferred by the owner before the tax became a lien, since that fact may be set up as a defense to the suit at law. *St. Johns Nat. Bank* v. *Township of Bingham*, 203.

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EQUITY PLEADING.

1. The defendant in a bill to quiet title, involving a determination of the question of title between the parties, may assert his legal title by a cross-bill. *McKenzie* v. *A. P. Cook Co.*, 452.

2. A bill by the owners of separate lots, who derive their titles from the same source, to enjoin one claiming a dower interest therein from instituting ejectment suits against them to recover such interest, and from prosecuting suits already instituted, is multifarious. *Douglass* v. *Boardman*, 618.

See MECHANICS' LIENS (3, 4).

EQUITY PRACTICE.

1. A decree entered by consent in a foreclosure suit, adjudging that the mortgagee "has been and is in possession, and is entitled to the possession and control, of the premises, * * * and empowered to collect all rents," is a concession by the mortgagor that the mortgagee is entitled to the rents, which is binding upon the mortgagor's administrator. *Kelly* v. *Bowerman*, 447.

2. Where a former employé of an insolvent corporation intervened in foreclosure proceedings against such corporation after the rendition of a decree therein providing for the sale of the mortgaged property, and of certain accounts and bills receivable assigned to S. by the mortgagor, and reassigned to the mortgagee, after the labor for which the intervener claimed had been performed, and directing that S. be paid out of the proceeds a specified sum, exceeding in amount the intervener's claim, it was not necessary that such decree be opened or modified in order to enable the intervener to obtain relief, but his debt could properly be made a charge upon the fund apportioned to S. *Michigan Trust Co.* v. *Grand Rapids Democrat*, 615.

See APPEAL AND ERROR (2, 5–7, 11); EXECUTION; INJUNCTION; RES JUDICATA (3–5).

ESTATES IN LAND—See WILLS (12–14).

ESTATES OF DECEDENTS.

1. A claim for an accounting against an estate on a contract creating a trust relation between claimant and decedent, where the transactions were all completed during decedent's lifetime, and were of such a character that, had he lived, the entire controversy could have been settled in a court of law, may be presented in probate court, without a resort to equity. *Sullivan* v. *Ross' Estate*, 311.

2. Notice of appeal by a creditor of a decedent's estate from the disallowance of his claim by the commissioners need not, under 2 How. Stat. § 5910, providing for notice of such appeal in such manner as the probate judge shall direct, be served on other creditors of the estate, unless the probate judge so directs. *Home Savings Bank* v. *Wayne Circuit Judge*, 385.

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ESTATES OF DECEDENTS—Continued.

3. The bond required by 2 How. Stat. § 5908, to be given to the "adverse party" on an appeal from the disallowance by the commissioners of a claim against a decedent's estate, properly runs to the administrator, and not to other creditors who contest the claim. *Id.*

4. The revival of the commission for the examination of claims against a decedent's estate, under 2 How. Stat. § 5894, at any time before the estate is closed, upon the payment of costs by the creditor making the application, is a matter not of discretion, but of right, and hence the probate court may enter the order without giving notice of the application to the administrator, heirs, or creditors. *Heavenrich* v. *Nichols' Estate*, 508.

5. An administrator who appears before the commissioners at the hearing upon a claim for the examination of which the commission has been revived is not in a position, upon the creditor's appeal from an order of disallowance, to raise the objection that no notice of the hearing was served upon him, or upon the heirs or other creditors of the estate. *Id.*

6. The fact that the meeting of the commissioners was delayed, without the fault of the creditor, two days beyond the time provided in the order reviving the commission, will not defeat the claim. *Id.*

7. B. died intestate, being possessed of personal property of great value. His wife survived him one year, and upon her death left her share of the estate to be divided among several legatees. A contest over the will was compromised, the will being set aside, and the manner of distribution of the estate agreed upon. B., 21 years before his death, had taken a lease of certain real estate for 100 years. The lessor's estate agreed, after various negotiations, to sell their rights under the lease and the fee of the land for a lump sum. The probate judge, upon application of the administrator of B.'s estate, authorized the purchase, claiming power to enter the order under Act No. 11, Pub. Acts 1897, which provides that, in case any continuing claim shall be made against the estate of a deceased person for rent under a lease, the administrator may, by and with the consent of the probate judge, compromise the claim, and may, in effecting the compromise, if necessary and if so ordered by the judge of probate, purchase the real estate covered by the lease, in which case the property so purchased shall be disposed of and distributed as personalty. *Held*, that the enactment and application of the statute did not deprive the heirs of the wife of B. of rights vested under their agreement, even though the agreement contemplated a conversion into money of all personal property belonging to the estate. *In re Beecher's Estate*, 667.

See AMENDMENTS (2); EXECUTORS AND ADMINISTRATORS; GIFT; RES JUDICATA (2); TRIAL (5); TRUSTS AND TRUSTEES; WILLS; WITNESSES (3, 4).

ESTIMATES—See EVIDENCE (1); MUNICIPAL CORPORATIONS (4, 12).

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ESTOPPEL.

1. A representation by A. to B. that certain lumber is the property of C., thereby inducing B. to bring an action for conversion against C. instead of A., will not estop A. from thereafter asserting title to the lumber, upon which B. has levied under his judgment against C., where B. had no valid claim against either A. or C. *McRae* v. *Bennett*, 47.

2. A lumberman who sells his lumber according to a certificate of inspection, after learning of a discrepancy between the actual measurement as shown by the certificate and his own estimate of the quantity of the lumber, cannot recover against the party who issued the certificate, upon the basis that his own estimate was correct and the certificate wrong. *Godkin* v. *Obenauer*, 93.

3. A vendor of goods is not estopped to reclaim them on the ground that they were procured by fraud, by reason of his having had notice, at the time of sale, of a mortgage given by the vendee to secure a pre-existing debt, and covering accessions to the stock. *Vincent* v. *Hansen*, 173.

4. The prosecution of a claim against a decedent's estate for the purchase price of logs alleged to have been sold and delivered to decedent under an oral agreement, though carried on with knowledge that the claim as presented is unfounded, and with an intent to deceive the court by keeping it in ignorance of a written contract by which the relations of the parties are defined, will not, on grounds of public policy, estop the claimant from thereafter asserting his rights under the written contract, and from seeking a recovery based upon the breach of a trust thereby created. *Sullivan* v. *Ross' Estate*, 311.

See BANKS AND BANKING (3); INSURANCE (1, 3, 4, 7); MORTGAGES (1).

EVIDENCE.

1. In an action against a township for damages alleged to have been sustained by reason of its negligence in permitting the supports of a bridge to become rotten, so that one side was lower than the other, the testimony of the highway commissioner that an actual measurement showed an incline of one inch, if unimpeached, must prevail as against the testimony of witnesses who confessedly rely upon estimates in placing the incline at several inches. *Perkins* v. *Township of Delaware*, 377.

2. In an action for malicious prosecution in procuring plaintiff's arrest upon a criminal charge, evidence of a statement made by the prosecuting attorney subsequent to the arrest, that he had told the defendant to withhold the warrant until the suspected person could be identified, is not substantive proof that the defendant was so instructed. *Eno* v. *Allen*, 399.

3. Where a witness in justice's court dies pending an appeal, evidence of what he testified to before the justice is admissible upon the trial at the circuit. *Detroit Baseball Club* v. *Preston Nat. Bank*, 470.

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EVIDENCE—Continued.

4. Upon an issue as to the payment of a note, evidence that the maker, on leaving his house with a sum sufficient to pay the note, stated that he was going to pay it, is not admissible as part of the *res gestæ*. *Schulz* v. *Schulz*, 503.

5. Evidence that the defendant, who claimed to have destroyed certain notes because he was told that he might be "put through" for "retracing" them, destroyed other notes at the same time, was admissible, as bearing on the probability of the reason assigned by him being the true one. *Id.*

6. A defendant cannot complain because a memorandum of account, used by him to refresh his memory upon a defense of set-off and recoupment, was received in evidence after he had been cross-examined upon it. *Smith* v. *Jackson*, 511.

7. A joint resolution of the legislature "authorizing the attorney general to commence legal proceedings to quiet title to certain lands in the township of Clay, St. Clair county, State of Michigan, in which this State has a legal interest," was not competent evidence to contradict that offered by the people, in a prosecution for illegally selling liquor upon such lands, to show that the sale was within the limits of St. Clair county. *People* v. *Rush*, 539.

8. One of two plaintiffs in replevin may be cross-examined as to his own understanding, and his co-plaintiff's admissions, concerning a material fact in the case. *DeGraw* v. *Emory*, 672.

See ATTACHMENT (3); BRIDGES (1–3); CONTRACTS (4, 5); COVENANTS (2); DEEDS; EXPERT TESTIMONY; FRAUDULENT CONVEYANCES (2); GIFT (2); HUSBAND AND WIFE (1, 2); LIBEL AND SLANDER (5); MUNICIPAL CORPORATIONS (1, 3); PERSONAL INJURIES (1); PLEADING (2, 4, 6); RAPE (2); TRESPASS (4); WILLS (1, 3–5, 7–9, 11); WITNESSES.

EXECUTION.

A purchaser of land against which a certificate of levy has been filed may obtain relief against an irregular sale of the interest of the judgment debtor by application to the court wherein the judgment was rendered, but a bill will not lie to set aside the levy and sale as a cloud upon his title. *Rhode* v. *Hassler*, 56.

See CONVERSION (2); EXEMPTIONS; PARTNERSHIP (6–8).

EXECUTORS AND ADMINISTRATORS.

1. The holder of a promissory note given by an intestate in his lifetime, and secured by a mortgage on realty, is liable to the estate for the repayment of interest moneys paid to him by the administrator out of the personal estate to induce him to defer sale under a decree of foreclosure, although the agreement was made in good faith, since an administrator has no authority to part with any portion of the estate in payment of a claim not regularly proved before the commissioners. *Miner* v. *Raymond*, 28.

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EXECUTORS AND ADMINISTRATORS—Continued.

2. The price paid for a suitable tombstone for a decedent is a proper charge in the executor's final account. *Jackson* v. *Leech's Estate*, 391.

3. Under 2 How. Stat. § 5958, providing that an executor or administrator shall be allowed "all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides, together with all extra expenses," reasonable attorney's fees for services actually and necessarily rendered by counsel in the settlement of the estate, although yet unpaid by the executor, are properly allowed to him in his final account. *Id.*

4. On an appeal from the allowance to an administrator in his final account of a sum for extraordinary services, the question of fact as to whether any such services were rendered was properly reserved by the court for its determination, without submission to the jury. *In re Brewster's Estate*, 561.

5. The circuit judge was justified in finding that the administrator rendered extraordinary services, entitling him to extra compensation, where it appeared that, for some time after the intestate's death, he advised with a surviving partner of the latter in respect to the partnership business, and entered actively into the management of the financial affairs of the firm, and, after a sale of the interest of the deceased, procured, through arbitration, a reduction of $1,000 in the amount of a claim for carrying on the business, preferred against the estate by the surviving partner. *Id.*

6. An administrator who deposits estate money, amounting to $36,000, subject to check, instead of upon certificate, and allows it to remain in such account for 3 months and 12 days, is chargeable with interest thereon at bank rates. *Id.*

7. The administrator is not relieved from liability for such interest because the question was not raised upon the first accounting after the distribution of the principal among the heirs, but it is a proper charge against him in his final account. *Id.*

8. The case is one of "unusual difficulty," within the meaning of 2 How. Stat. § 9015, providing for an extra allowance to executors in cases of unusual difficulty or responsibility, in which the executor is obliged to perform services not required of an executor in the ordinary course of his employment. *In re King's Estate*, 606.

9. Services rendered by an executor in hunting up witnesses for proponents upon a contest of the will, in bringing them to counsel, and in assuming the responsibility of procuring their attendance at court, may properly be classed as extraordinary. *Id.*

10. The amount of an allowance for extraordinary services is discretionary with the trial judge, if there is evidence to support the claim. *Id.* 607.

See AMENDMENTS (2); EQUITY PRACTICE (1); ESTATES OF DECEDENTS; STATUTES.



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EXECUTORY DEVISE—See WILLS (12).

EXEMPTIONS.

1. Section 1 of Act No. 14, Pub. Acts 1885 (3 How. Stat. § 1717*a*), limiting the right of exemption to the articles therein enumerated, not exceeding $500 in value, in cases where the execution is issued upon a judgment for personal labor, is invalid as class legislation, and as contravening section 1, art. 16, of the Constitution, which provides that the personal property of every resident of the State, to consist of such property as shall be designated by law, shall be exempted, to the amount of not less than $500, from sale on execution or other final process of any court, issued for the collection of *any debt*. *Burrows* v. *Brooks*, 307.

2. The interest of a corporation in an electric plant, erected for the use of a city under a contract which has been declared void in a suit by taxpayers of the city for an accounting as to the moneys received thereunder, is not exempt from sale on execution issued upon the decree obtained in such suit, on the ground that such plant is devoted to public use. *Campbell* v. *Western Electric Co.*, 333.

See TAXES (9); TELEPHONE COMPANIES.

EXPERT TESTIMONY.

In an action for personal injuries, physicians, called as experts, were asked if certain conditions described by them might be caused by the injury shown. It was objected that the form of the question should be whether they would "probably" be caused thereby. *Held*, that the degree of probability was a proper subject for cross-examination, and did not need to be indicated by the question. *Bush* v. *St. Joseph, etc., R. Co.*, 513.

EXPLOSION—See NEGLIGENCE (5).

EXTENSION OF TIME—See BILLS AND NOTES (3); PRINCIPAL AND SURETY.

EXTRAORDINARY SERVICES—See EXECUTORS AND ADMINISTRATORS (4, 5, 8–10).

FALSE REPRESENTATIONS—See FRAUD (6, 7); INSURANCE (2, 6, 7).

FEDERAL INTERESTS—See JURISDICTION.

FELLOW-SERVANTS—See RAILROAD COMPANIES (7).

FELONIOUS ASSAULT—See RAPE.

FENCES—See RAILROAD COMPANIES (9).

FIRE INSURANCE—See INSURANCE (1–5); MUTUAL INSURANCE COMPANIES.

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FIXTURES.

Defendant erected a building on mortgaged premises owned by him, and, after default, deeded the property to plaintiff, the mortgagee, in satisfaction of the mortgage, taking back a lease for one year, with an option to purchase. Within the year he removed the building to other land owned solely by him, and, in replevin by plaintiff, claimed that the building was erected for partnership purposes by a firm of which he was a member, and was to be removable at their option. Plaintiff testified that defendant assured her, when the deed was given, that the building would become her property, and that he had first tried to borrow more money because of the additional security. There was also testimony that defendant had made contradictory statements with respect to his reasons for removing the building. *Held*, that the evidence raised a question for the jury as to whether the building was personal property, as claimed by defendant, or was in fact a fixture. *Byrnes* v. *Palmer*, 17.

FORECLOSURE—See APPEAL AND ERROR (2); EQUITY PRACTICE; VENDOR AND PURCHASER.

FOREST PRODUCTS—See TAXES (2, 3).

FORFEITURE OF FRANCHISE—See INJUNCTION (2); STREET RAILWAYS (2–4).

FORGERY.

Upon a review of the evidence, the conclusion of the lower court that defendant never executed the mortgage sought to be foreclosed was affirmed. *Ann Arbor Savings Bank* v. *Ellison*, 557.

FRAUD.

1. In an action upon a written lease, plaintiff, by proving the execution of the instrument and offering it in evidence, makes out a *prima facie* case, and the burden is upon defendant, who seeks to avoid its effect under a claim that his signature was fraudulently obtained, to establish the fraud. *Bly* v. *Brady*, 176.

2. Upon a consideration of the testimony, *held*, that complainant had failed to establish his claim that certain stock, pledged as collateral to a note and mortgage, was fraudulently withheld from him upon the occasion of his taking an assignment of the mortgage. *Woodcock* v. *First Nat. Bank of Niles*, 236.

3. Plaintiff, a bridge manufacturing company, appointed a certain person as its agent to take orders for bridges, under a contract which gave to the agent an interest in the profits of each separate contract secured by him. Upon a settlement between the company and its agent, it directed the defendant to pay to the agent the price of a bridge erected by it, and the agent, in consideration thereof, gave to the plaintiff certain orders for money due on other contracts. Four days later plaintiff attempted to rescind the settlement on the ground

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FRAUD—Continued.

of fraud, and notified defendant to that effect, and thereafter brought suit to recover the contract price for the bridge, which had been paid to the agent. It appeared upon the trial that the orders turned over to plaintiff under the settlement were not returned to the agent, and it was therefore *held* that plaintiff was not in a position to claim a rescission. *Canton Bridge Co.* v. *City of Eaton Rapids*, 328.

4. Complainants, heirs at law of defendant's deceased husband, filed a bill to revive a mortgage given by defendant to deceased, and alleged to have been fraudulently destroyed. Defendant admitted that she gave the mortgage as security for the payment of the purchase price of the lands covered thereby, but claimed that it was destroyed in the lifetime of the deceased, with his knowledge and consent. Deceased was shown to have been a man of weak intellect. The court found with the complainants, and declared the amount of the mortgage to be a lien upon the premises. *Landis* v. *Landis*, 354.

5. Evidence that the grantor in a deed of property worth about $1,500, for a specified consideration of $1,800, was old and of weak memory, and that the grantee actually paid only $5 down, and failed to secure the balance by mortgage on the property as had been contemplated, and that the grantor was induced to convey by fear as to the outcome of a suit brought against the grantee, who was his tenant, by a third person, to oust him from possession,—justifies the setting aside of the deed. *Landis* v. *Smith*, 407.

6. An assignor of a mortgage who falsely represents that it is a first mortgage, and that the property is good security, upon which representations he knows that the assignee relies in taking the assignment, cannot claim that the latter is not entitled to relief because he might have discovered the facts by an examination of the abstract of title. *Cornell* v. *Crane*, 460.

7. Whether an assignee of a mortgage was guilty of such laches as would prevent a rescission for false representations was a question for the jury, where it appeared that formal notice of rescission was served six months after the falsity of the representations was first ascertained, and that the intermediate period was largely occupied in obtaining information as to the facts, for which delay the assignor was in part responsible. *Id.*

8. An attorney's assertion of his client's claim of dower in certain lots in an amount greatly in excess of that which the owners believe to be justifiable, and his threat that, if the amount is not paid, he will institute suits in ejectment, which would involve costs to an extent rendering it more expensive for the owners to litigate than to accede to his demands, is not such an indication of fraud as will justify a court of equity in enjoining the prosecution of the suits at law. *Douglass* v. *Boardman*, 618.

See AMENDMENTS (3); ASSUMPSIT (1); ATTACHMENT (3); ESTOPPEL (3, 4); PAYMENTS (2); PLEADING (2); RES JUDICATA (1, 4); SETTLEMENT (1); STATUTE OF FRAUDS.

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FRAUDULENT CONVEYANCES.

1. The mere fact that a transfer or series of transfers by a debtor to his creditor will necessarily hinder or delay other creditors, or prevent the collection of their claims, does not render the same fraudulent as a matter of law. *McMorran* v. *Moore*, 101.

2. Evidence that a demand for the retraction of a libelous article was not complied with by the publishers is inadmissible in garnishment proceedings based upon the alleged fraudulent transfer of the newspaper assets pending an appeal from a judgment for the libel, since the inference of malice to be drawn therefrom would go no further than the judgment itself towards showing a motive for a fraudulent disposition of the property. *Long* v. *Evening News Ass'n*, 261.

3. The fact that the tangible assets of a newspaper, whose transfer of all of its assets to another paper in payment of a debt is attacked as fraudulent by a judgment creditor, did not exceed in value the amount of the indebtedness, will not necessarily relieve the assignee from liability in garnishment, where no account was taken of intangible assets. *Id.*

4. That a franchise of the assignor in the Associated Press was transferable only with the consent of the association, and that its business had for several years been conducted at a loss, is insufficient to show that the franchise and good will were properly disregarded in the transaction as of no value; it being for the jury to determine, upon proper evidence, whether their inclusion without compensation was in fraud of creditors. *Id.*

5. The fact that two chattel mortgages executed by an insolvent corporation to different persons were authorized by the board of directors at the same meeting, and given on the same day, does not constitute them parts of the same transaction, so that the fraudulency of one as to creditors vitiates the other. *Kock* v. *Bostwick*, 302.

6. Property taken by a husband in the name of his wife under a verbal agreement that such conveyances should thereafter be made as he should be advised would vest title in them jointly, and subsequently deeded to a third person to be reconveyed to the husband and wife, will not be subjected to the claims of creditors of the wife, who levy thereon after the agreement has been carried out in good faith, merely because the wife, under 2 How. Stat. § 5569, providing that no trust shall result in favor of a person furnishing the consideration for a conveyance to another, was at liberty to refuse to carry out the parol agreement. *Desmond* v. *Myers*, 437.

7. A conveyance by a husband to his wife, without a present consideration, made at a time when the husband is sought to be held as surety upon the bond of a defaulting township officer, and embracing property the title to which has stood in his name for 25 years, and which was included in his estimate of assets when he gave the bond and justified as to his responsibility, is fraudulent as to the township, even though

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FRAUDULENT CONVEYANCES—Continued.

the property was originally purchased under an arrangement entered into by the wife without the knowledge of the husband, and was paid for out of a common fund to which her earnings contributed. *Township of Maple Valley* v. *Foley*, 622.

GARNISHMENT.

1. The principal defendant has the right, at least in the absence of objection by the garnishee, to intervene in garnishment proceedings, and urge the exemption of the garnished fund. *McDougall* v. *Lamb*, 69.

2. Judgment cannot be rendered against a garnishee in justice's court unless his disclosure clearly shows a liability to the principal defendant. *Ruhl* v. *A. Ruoff Brewing Co.*, 291.

3. A garnishee's disclosure which does not expressly admit an indebtedness to the principal defendant, but, on the contrary, avers that the latter is indebted to the garnishee, and further states that, prior to the service of the summons, the garnishee had contracted in writing to pay the liquor tax of the defendant, who thereupon paid a part of the amount of such tax to the garnishee, agreeing to pay the balance in monthly installments, and that the garnishee had not paid the tax at the time the summons was served, fails to make a *prima facie* case for the plaintiff. *Id.*

See FRAUDULENT CONVEYANCES (2–4).

GIFT.

1. An executor is not entitled to a directed verdict in an action for the conversion of a promissory note alleged to have belonged to the estate, where defendant's claim that the note was a gift to her from the testator in his lifetime is supported by evidence that he had deposited to her credit amounts equal to the several payments of interest upon the note on the same days that interest was paid to him, that he had inquired of her in the presence of third parties as to what she wished done with the moneys from such note, that the note bore the indorsement of the testator, and that the defendant produced it, after the testator's death, from among her own private papers. *Harris* v. *Cable*, 192.

2. The testimony of an alleged donee of a note from a decedent, that, at the time she produced the note in response to the request of the executor, she stated that it was hers by gift from the testator, is admissible to rebut any inference of an admission against her ownership, arising from the production of the note in response to such request. *Id.*

GOOD WILL—See FRAUDULENT CONVEYANCES (4).

GREAT LAKES—See WATERS.

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GUARANTY.

Notice of acceptance is essential to bind as guarantors persons who, in response to the request of the principal, sign a guaranty for the payment of goods to be sold him on credit, where the offer of the guarantee to sell the goods was conditional upon his approval of the guarantors. *De Cremer* v. *Anderson*, 578.

HEARSAY—See EVIDENCE (2); WILLS (11).

HIGHWAYS.

1. The power of the courts to vacate a city street upon petition of the abutting land owners is not necessarily subject to the acquiescence of the city authorities. It should, however, when opposed by them, be sparingly exercised. *In re Albers' Petition*, 640.

2. The general jurisdiction of the circuit court over proceedings to vacate a city plat under chapter 32, 1 How. Stat., was not supplanted as to streets in the city of Grand Rapids by the provisions of the charter conferring upon the common council certain general authority over streets, or by the statute (2 How. Stat. § 6576) giving the superior court of Grand Rapids exclusive jurisdiction of all actions of a civil nature, at law or in equity, "against the city" or any of its officers. *Id.*

3. Act No. 353, Local Acts 1895, amendatory of the charter of the city of Jackson, which authorizes the vacation of any street or part of street, without application to the court, if all persons interested in the plat, or a "distinct part thereof," consent thereto, requires the consent of those persons only who have a legal right to compensation on the vacation of the street, and notice to others owning property on the plat is not essential to jurisdiction. *Baudistel* v. *Michigan Cent. R. Co.*, 687.

See BRIDGES; CONTRIBUTORY NEGLIGENCE (1, 2, 4, 6); MUNICIPAL CORPORATIONS (1–3, 7, 13–18).

HOMESTEAD.

A written contract provided that S., in consideration of the sum of $225, would convey certain lots to L.; that L. should erect a dwelling house upon one of the lots, for which S. would furnish the lumber and do the mason work; and that L. should purchase the lots, and pay for them, and for the labor and material, in the manner thereinafter provided. By a further provision, S. was to deliver to L., when the house should be completed, a statement of labor and materials furnished by him, the full amount whereof should, when agreed upon, with the $225 for the lots, be filled into "the annexed land contract," which should then be executed by the parties. No time for the payment or conveyance was otherwise provided. *Held*, that L. acquired no homestead rights by virtue of his possession under such contract, it amounting merely to an agreement between the parties that, in case certain conditions should be performed, a contract of sale would be made on terms to be agreed upon. *Rentchler* v. *Lawton*, 14.

See APPEAL AND ERROR (8).

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HUSBAND AND WIFE.

1. Statements made by a wife, not in the presence of defendant, and letters written by her, may be admissible, in an action by her husband for alienating her affections, for the purpose of showing her state of mind towards him. *McKenzie* v. *Lautenschlager*, 171.

2. Under 3 How. Stat. § 7546, a husband is disqualified to testify, in an action brought by him for the alienation of his wife's affections, to conversations between himself and wife, not occurring in the presence of defendant, unless the wife consents. *Id.*

3. A husband, while in joint occupancy of land with his wife, cannot acquire a tax title valid as against her. *Ward* v. *Nestell*, 185.

4. A wife's conveyance of her property in payment of her husband's debt is supported by a sufficient consideration. *Kieldsen* v. *Blodgett*, 655.

See COVENANTS (4); FRAUDULENT CONVEYANCES (6, 7); INSURANCE (2, 5); MARRIED WOMEN.

IDENTIFICATION OF GOODS—See LARCENY (2).

IMPROVEMENTS.

The owner of land is entitled, upon establishing his claim as against one who has held the land under color of title for a number of years, and has made improvements thereon, to his election as to whether he will take the land, and pay the increased value due to the improvements, or abandon the land to defendant, upon payment by him of the value it would have had if no improvements had been made. *McKenzie* v. *A. P. Cook Co.*, 452.

See EJECTMENT (1, 2).

INFANTS—See WITNESSES (2).

INJUNCTION.

1. The owner of a private sewer, who has the exclusive right to use the same, may maintain a bill to enjoin its use by other citizens, who connect therewith without his consent, where such use results in clogging the sewer and flooding the owner's house. *Boyden* v. *Walkley*, 609.

2. The circuit judge is justified, however large the interests involved, in refusing a preliminary injunction to restrain a city from enforcing a forfeiture of the franchise of a street-railway company, where it appears that the city is proceeding in exact accordance with the terms of its contract with the company. *Union St. Ry. Co.* v. *Saginaw Circuit Judge*, 694.

See ELECTION OF REMEDIES (2); EQUITY JURISDICTION; EQUITY PLEADING (2); FRAUD (8).

INSOLVENCY—See LABOR DEBTS.

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INSPECTION OF POLES—See, MUNICIPAL CORPORATIONS (16, 17).

INSTRUCTIONS TO JURY—See CONTRACTS (3); LIBEL AND SLANDER (3, 4); TRESPASS (1); TRIAL (3, 7, 10–12, 14); WILLS (2, 6).

INSURANCE.

1. An insurance company, by placing its refusal to pay a loss solely upon the ground that the policy had been canceled, waives its right to assert as a defense to an action thereon that the insured had not submitted his claim to arbitration, that he was not the owner of the property insured, or that he had failed to disclose incumbrances. *Douville* v. *Farmers' Mut. Fire Ins. Co.*, 158.

2. The statement of an applicant for insurance, that he holds the property sought to be insured on contract, does not, in itself, amount to a misrepresentation of his interest, although the contract runs to himself and wife. *Miotke* v. *Milwaukee Mechanics' Ins. Co.*, 166.

3. The conditions of an insurance policy may be waived by the company, not only by express agreement, but by conduct which amounts to an estoppel. *Id.*

4. Where an insurance company employs, as a solicitor of insurance, a foreigner who is not possessed of a sufficient knowledge of the English language to enable him to fill the blanks in his daily report, and the solicitor, having secured the application of a foreigner of a different nationality, with whose language he is likewise unfamiliar, leaves blank the space designed to show the holding of the applicant, being advised by his superior that, if the blanks are not filled, he will "fix it over," and the company accepts the consideration and issues the policy, it will be estopped to assert, after a loss, that it took it for granted that the blank indicated title in the applicant by deed, and will be held to have contracted to insure the interest which the applicant actually had, notwithstanding a provision in the policy that it should be void if the interest of the insured were other than unconditional and sole ownership. *Id.*

5. A husband has an insurable interest in real property held under a contract running to himself and wife jointly, and the amount of his recovery does not depend upon the loss to his individual interest, but on the damage accruing to whatever interests are covered by the policy, where the wife authorized or ratified his act in procuring the insurance. *Id.*

6. To the question in an application for membership in a mutual benefit society, "Has any examining physician for a life-insurance company or order declined to recommend your application?" the applicant answered, "No." The answer was untrue. The application in terms made the truth of each answer a condition precedent to the validity of the certificate of insurance issued thereon, and neither the company nor its agent was advised of the falsity of the statement at the time the risk was accepted. *Held*, that the certificate was void. *Finch* v. *Modern Woodmen of America*, 646.

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INSURANCE—Continued.

7. The collection of an assessment from a member of a mutual benefit society does not constitute a waiver by the society of a provision in the benefit certificate that it should be void if the statements contained in the application for membership were untrue, where the officers were not aware of any false statements when they accepted payment. *Id.*

See ACCIDENT INSURANCE; CUSTOM; MUTUAL INSURANCE COMPANIES; RES JUDICATA (4).

INTANGIBLE ASSETS — See FRAUDULENT CONVEYANCES (3, 4).

INTENT — See CONSTITUTIONAL LAW (1); CRIMINAL LAW (2); TRESPASS (3).

INTEREST—See EXECUTORS AND ADMINISTRATORS (6, 7); TRESPASS (2).

INTERVENERS—See EQUITY PRACTICE (2); GARNISHMENT (1).

INTOXICATING LIQUORS.

1. Upon a prosecution for keeping a place for the sale of intoxicating liquors in violation of the local option law, the contents, occupants, and appliances of respondent's place of business, and their adaptability to traffic in liquor, are proper matters of inquiry, and the prosecutor, therefore, has the right to "submit" in his argument that the room which the respondent is charged with keeping was fitted up for the express purpose of violating the law. *People* v. *Barnes*, 213.

2. All who aid and assist in keeping a place where intoxicating liquor is sold in violation of the local option law, whether as owner or clerk, are principals. *Id.*

3. A conviction of violating the liquor law, based upon competent evidence and following proper instructions, was affirmed. *People* v. *Harrington*, 523.

4. The fact that a witness to whom an unlawful sale of liquor was made was employed by the prosecuting attorney as a detective with a view to respondent's prosecution is no defense. *People* v. *Rush*, 539.

5. Unsurveyed lands within the boundaries of the various counties and townships of the State are not exempt from the operation of the general liquor law. *Id.*

6. Act No. 116, Pub. Acts 1895, amendatory of an act entitled "An act to authorize the formation of corporations for the purchase and improvement of grounds to be occupied for summer homes, for camp meetings," etc., does not constitute a special law for the government of such places in such sense as to take them without the provisions of the general liquor law of the State. *Id.* 540.

See CRIMINAL LAW (1).

INVENTORY—See LOG-LIEN PROCEEDINGS.

ISLANDS—See WATERS.

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JUDGMENT—See BAR; JUSTICES OF THE PEACE (1, 2); RES JUDICATA.

JUDICIAL CIRCUITS—See COURTS.

JURISDICTION.

The fact that a defendant in ejectment is in possession of the disputed premises on behalf of the general government is insufficient to deprive the court of jurisdiction, but, to constitute a defense, it must appear that the right of the government is paramount to that of the plaintiff. *Scranton* v. *Wheeler*, 565.

See HIGHWAYS; WRIT AND PROCESS.

JURY.

1. The trial judge may limit, reasonably, the extent of the *voir dire* examination of jurors. *Ford* v. *Cheever*, 440.

2. Error will not lie upon the overruling of respondent's challenge for cause, where it does not appear from the record that he exhausted his peremptory challenges, or that the challenged person sat as a juror. *People* v. *Rush*, 539.

See TRIAL (1).

JUSTICES OF THE PEACE.

1. Defendants who take a special appeal from a justice's judgment, alleging as error that the docket entry, "judgment against defendant," does not indicate against which of the defendants judgment was rendered, are bound by an amended return, made at their request, whereby it appears that the judgment was against both. *Hinkle* v. *Collins*, 105.

2. That a plaintiff in justice's court has a Christian name other than the initials by which he sues is not established, on special appeal, by the return of the justice to that effect, where there is nothing in the proceedings themselves from which the fact could be judicially ascertained. *Id.*

3. The return of a justice, in a cause appealed to the circuit court, that plaintiff declared in a plea of trespass on the case, that defendant pleaded the general issue, and that judgment was rendered for the plaintiff, is sufficient to confer jurisdiction. *Carver* v. *Smith*, 207.

4. Where the defendant in a cause appealed from justice's court appears in the circuit, and objects to the court's taking jurisdiction because no declaration is returned, plaintiff may be permitted to show by the affidavit of the justice, without formal motion, that the original declaration has been lost, and that a declaration attached to the affidavit is, to the best of affiant's knowledge and belief, the same as that filed in justice's court. *Id.*

See ATTACHMENT (4); CERTIORARI; CONSTITUTIONAL LAW (2, 3, 5); CRIMINAL LAW (3, 4); GARNISHMENT (2, 3); PLEADING (1, 2, 5).

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JUSTIFICATION—See LIBEL AND SLANDER (2).

KILLING STOCK—See RAILROAD COMPANIES (9).

LABOR DEBTS.

1. Debts owing by an insolvent newspaper corporation to its employés for the gathering of news items, the performance of editorial work, the preparation and correction of copy, and the reading of proof, are not debts for labor, within 3 How. Stat. § 8749*m*, making such debts preferred claims against the estate of an insolvent. *Michigan Trust Co.* v. *Grand Rapids Democrat*, 615.

2. But the amount due to a mailing clerk for getting out, addressing, and mailing the paper to the various subscribers is a debt for labor, within the meaning of the statute. *Id.*

See EQUITY PRACTICE (2); EXEMPTIONS (1).

LACHES.

In the absence of evidence of an actual intent on the part of a plaintiff in ejectment to abandon his suit, mere delay, though long continued, in bringing the case to trial, will not be construed as an abandonment; at least where there has been no motion to dismiss for failure to prosecute. *McKenzie* v. *A. P. Cook Co.*, 452.

See FRAUD (7).

LAND CONTRACTS — See HOMESTEAD; NOTICE; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS (3); VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. The fact that a tenant for a term of years becomes seriously ill shortly before the expiration of his term, and after removal operations have actually begun, does not deprive the landlord of his right to treat the tenant's failure to complete the removal before the lease expires as a renewal of the lease for another year. *Mason* v. *Wierengo's Estate*, 151.

2. The right of a lessor to treat a lessee who holds over after the expiration of his term as a tenant, and not a trespasser, is not affected by the fact that the lessee had no intention of renewing his lease. *Id.*

3. Where a lessor assigns the lease, the lessee is under legal obligation to pay the rent to the assignee; no formal act of attornment being necessary. *Kelly* v. *Bowerman*, 446.

See CONVERSION (1).

LARCENY.

1. Upon a prosecution for receiving stolen property, evidence that the barber shop of the complaining witness was broken open in the night-time, that, when he came there in the morning, nothing was in the place, and that the articles lost, which belonged to him, consisted of those described in the information, was sufficient to justify a finding that the property was feloniously taken. *People* v. *Moloney*, 536.

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LARCENY—Continued.

2. The testimony of the complaining witness that one of the razors found in the respondent's possession had a rivet similar to that in one stolen from him, and that he had never seen any other razor with such a rivet, was sufficient to go to the jury upon the question of the identity of the property. *Id.*

LEASE—See LANDLORD AND TENANT.

LIBEL AND SLANDER.

1. To say to another, "You are a liar and a thief," is, if left unexplained, slanderous, and actionable *per se*. *Youngs* v. *Adams*, 199.

2. The defense of justification is not established, in an action for slander in calling one a thief, by proof of cheating, trickery, and fraud, not amounting to actual theft. *Id.*

3. Where, in an action for slander in imputing to plaintiff a want of chastity, defendant produced testimony tending to show that, at the time of the alleged slander, plaintiff's reputation for chastity was bad in the neighborhood in which she resided, defendant was entitled to an instruction that, if it should be found that a general rumor already prevailed in the neighborhood of the same tenor as the words charged, plaintiff should not recover as much damages as if no such rumor prevailed. *Fowler* v. *Fowler*, 575.

4. The failure to give such instruction was not justified by the fact that it was claimed by the plaintiff that the defendant was himself responsible for some of the rumors, since the proposed instruction was proper in the abstract, and might have been qualified, if desired by the plaintiff, so as to exclude rumors started by the defendant himself. *Id.*

5. A defendant in an action for slander may show in mitigation of damages, as bearing on the *quo animo*, that, before uttering the words imputed to him, he had been informed that stories to the same purport as his subsequent statement were already afloat in the neighborhood. *Id.*

See FRAUDULENT CONVEYANCES (2); TRIAL (6).

LIENS—See BANKS AND BANKING (2, 3); MECHANICS' LIENS; RES JUDICATA (6); WILLS (14).

LIFE INSURANCE—See INSURANCE (6, 7).

LIGHTING—See MUNICIPAL CORPORATIONS (8–11).

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

LIMITED PARTNERSHIPS.

1. At the expiration of the period covered by articles of special partnership, like articles were signed, reciting that the special partner had "contributed to the capital stock of the firm the sum of $10,000." The affidavit of one of the general partners recited that the special partner had actually, in good faith, contributed such sum in cash to the capital stock. At the

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LIMITED PARTNERSHIPS—Continued.

expiration of the period covered by the new articles, the firm went out of business, and a sale of the partnership property under a mortgage failed to bring enough to pay unsecured creditors. In an action by a creditor for goods sold to the firm, it was contended that the certificate and affidavit were false, in that they stated the contribution of the special partner to be in cash, whereas it consisted of his interest in the partnership which had expired, and that, in consequence of the alleged false statement, the special partner was liable under 1 How. Stat. § 2349, for all the engagements of the general partners. *Held*, that the execution of the new articles was in effect a renewal of the former partnership in accordance with section 2352, 1 How. Stat., and that the statement in the renewal affidavit should be referred to the time of the formation of the partnership. *Hogan* v. *Hadzsits*, 568.

2. To render a special partner liable for firm debts on account of his withdrawal of interest or profits, one of the conditions prescribed by 1 How. Stat. § 2355, to wit, the reduction of the capital stock below the sum stated in the certificate, or the insufficiency of the assets to pay the partnership debts, must exist. *Id.*

LIS PENDENS—See RECORDING LAWS (1).

LOCAL OPTION LAW—See INTOXICATING LIQUORS (1, 2).

LOG-LIEN PROCEEDINGS.

It is essential to the validity of attachment proceedings under the log-lien law (Act No. 229, Pub. Acts 1887), where the property attached was not in transit, that it appear from the officer's return that a copy of the inventory was served upon the principal defendant. *Sheridan* v. *Colton*, 112.

See RES JUDICATA (6).

LOSS OF PROFITS—See DAMAGES.

LOST FILES—See JUSTICES OF THE PEACE (4).

MALICE—See FRAUDULENT CONVEYANCES (2).

MALICIOUS PROSECUTION—See BAR; EVIDENCE (2).

MANDAMUS—See RES JUDICATA (2).

MARRIED WOMEN.

In an action by a married woman for personal injuries, an instruction that the damages recoverable include the moneys necessarily paid for medicinal treatment and care is erroneous, in the absence of evidence that such expenditure was made from her individual estate. *State* v. *City of Detroit*, 643.

See HUSBAND AND WIFE.

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MASTER AND SERVANT.

1. In an action by a mill employé for injuries sustained while oiling an overhead shaft, the plaintiff's witnesses testified that the platform on which the oiler stood was about seven feet above the floor, and consisted of a single plank 10 or 12 inches wide, supported on brackets placed at different heights and angles, so that it was inclined, and "wobbled" when in use. Defendant's witnesses testified that there were two boards, and that they were placed horizontally. *Held*, that there was evidence upon which the jury might find that the employer was negligent in the construction of the platform. *Zimmerman* v. *Detroit Sulphite Fibre Co.*, 1.

2. The court should have eliminated from the consideration of the jury all questions of negligence based upon the alleged dangerous proximity of the platform to revolving belts, and upon the alleged insufficient light, no tangible evidence having been presented by plaintiff to sustain either of these theories. *Id.*

3. The statutory duty imposed upon manufacturers by Act No. 126, Pub. Acts 1893, §§ 11, 12, to provide certain safeguards for machinery in the discretion of the factory inspector, does not exist until the inspector has declared such safeguards necessary. *Monforton* v. *Detroit Pressed Brick Co.*, 39.

4. No recovery can be had against an employer for the death of an employé 14 years of age, resulting from his coming in contact with an uncovered revolving shaft, where the deceased had no duties to perform with or about the shaft, and had been warned to keep away from it. *Id.*

5. In an action to recover for injuries inflicted by defendant's servant, the plaintiff has the burden of proving that the act complained of was within the scope of the servant's employment. *Randall* v. *Chicago, etc., R. Co.*, 115.

6. An employé who, in the line of his duty, has frequently oiled a revolving shaft at a point within four inches of a set screw, although required to enter a dark recess for that purpose, cannot recover for injuries received by reason of his clothing coming in contact with the screw while he was leaning over the shaft, without a light, to perform another service. *Sakol* v. *Rickel*, 476.

See RAILROAD COMPANIES (7).

MECHANICS' LIENS.

1. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon the statute, and therefore, upon the question whether a lien attaches at all, a strict construction of the statute is proper; but, after the lien has once attached, a liberal construction should be put upon the statute, for the purpose of fulfilling its objects. *Smalley* v. *Northwestern Terra-Cotta Co.*, 141.

2. Failure of a claimant under the mechanic's lien law to file with the register of deeds, before commencing proceedings to enforce his lien, proof of service upon the owner of a

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MECHANICS' LIENS—Continued.

copy of the statement of lien, will not invalidate the proceedings as to such owner, where all of the steps to establish the lien have been regularly taken, and the owner's rights have been fully protected. *Id.*

3. Section 10 of the mechanic's lien law (Act No. 179, Pub. Acts 1891) provides that amendments may be made to any bill or cross-bill at any time before final order. Section 27 provides that amendments to any process, pleadings, or proceedings, either in form or substance, shall be allowed at any time before final decree is rendered, upon such terms as justice may require. *Held*, that an amendment to an answer in the nature of a cross-bill may be allowed in such proceedings, if it seeks, not to introduce a new cause of action, but to state properly the facts which constitute the cause of action set up in the original answer, even though the statute of limitations would bar a new bill. *Id.*

4. Section 10 of the mechanic's lien law (Act No. 179, Pub. Acts 1891) requires the complainant in lien proceedings to make all persons having rights affected by the lien claimed, all holding like liens, and all who have filed notice of an intention to claim a lien, parties to the action; authorizes such persons to make themselves parties, on motion and notice to complainant, and to file their intervening or cross bills, or answers claiming the benefit of cross-bills, and notices of *lis pendens* therein; and provides that such cross-bills shall be sworn to, and shall be evidence of the matters therein charged, unless denied by answer under oath. *Held*, that a defendant may obtain affirmative relief against a co-defendant by an answer in the nature of a cross-bill; it being clear that the statute contemplates that all the parties in interest may be brought into court and have their respective interests adjudicated in one proceeding. *Id* 142.

5. Under section 9, subd. 3, of the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893), providing that such liens shall be preferred to all other titles, liens, or incumbrances which may attach to or upon the building or land subsequent to the commencement of such building, a mechanic's lien takes precedence of a mortgage executed after the actual commencement of the building, although no part of the labor or materials for which the lien is claimed was performed or furnished until after the execution and recording of the mortgage. *Kay* v. *Towsley*, 281.

6. Section 6 of the act, providing for the service of a copy of the statement of lien upon the "owner" of the premises, does not apply to a mortgagee whose security is in the form of an absolute conveyance. *Id.*

7. An owner who makes payments to a contractor without requiring of him the statement as to the amount due or to become due to material men, which, under section 4 of the lien law (Act No. 179, Pub Acts 1891), he may lawfully demand, does so at his own risk (Act No. 199, Pub. Acts 1893, § 1); and

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MECHANICS' LIENS—Continued.

the fact that he believed at the time that moneys previously advanced by him to material men on the contractor's order had paid such claims in full will not relieve the property from a lien for the balance due, there having been no misrepresentation on the part of the claimants. *Munroe* v. *Merrell*, 491.

MEMORANDUM—See EVIDENCE (6).

MENTAL COMPETENCY—See WILLS (5, 6, 9).

MISTAKE.

A grantee, through mesne conveyances from the owner of a quarter section, of a parcel described in the deeds in the chain of title as the east half of the quarter section, is entitled to a reformation of the deeds, and a conveyance of sufficient of the land which, according to the governmental line, belongs to the west half, to make up the amount by which the east half falls short of 80 acres, where it was the original intention to convey the full 80 acres, and the owner of the west half was aware of such intention when he purchased, and such land has for years been in the actual possession of such grantee without objection. *Perkins* v. *Canine*, 72.

See BAIL; ELECTION OF REMEDIES (1); MUNICIPAL CORPORATIONS (12).

MITIGATION OF DAMAGES—See LIBEL AND SLANDER (3, 5).

MONEY HAD AND RECEIVED—See ASSUMPSIT.

MORTGAGES.

1. An assignee of a mortgage given by a corporation cannot rescind the assignment upon the ground that the mortgage was the outgrowth of an *ultra vires* transaction, where he was aware of the facts upon which such contention is based before he accepted the assignment. *Woodcock* v. *First Nat. Bank of Niles*, 236.

2. An assignment of rents of mortgaged property, to be received by the mortgagee and applied upon the mortgage, is valid. *Kelly* v. *Bowerman*, 446.

See BILLS AND NOTES (1); EQUITY PRACTICE; FIXTURES; MECHANICS' LIENS (5, 6); POWER OF ATTORNEY; RECORDING LAWS (2).

MOTIVE—See FRAUDULENT CONVEYANCES (2).

MULTIFARIOUSNESS—See EQUITY PLEADING (2).



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MUNICIPAL CORPORATIONS.

1. Under a declaration charging defendant with permitting a sidewalk to become and remain rotten and out of repair, plaintiff may show that the walk had not been rebuilt or repaired for upwards of 20 years. *Haynes* v. *City of Hillsdale*, 44.

2. For the court to remark in the presence of the jury, upon the trial of a suit for injuries alleged to have been sustained because of a defective sidewalk, that the fact that the walk would spring when walked upon was not, in itself, a defect which would entitle plaintiff to recover, is reversible error; the weight of such evidence being for the jury. *Id.*

3. Evidence that other portions of the walk, built at the same time as that portion whereon the accident occurred, were out of repair, was admissible on the question of notice. *Id.*

4. The courts will not assume that the common council of a city failed to make an estimate of the general expenditures, as required by the charter, before levying the city taxes, because no entry thereof is made upon the records of the council, where there is no express provision requiring such entry to be made. *Auditor General* v. *Hutchinson*, 245.

5. Action taken at a special meeting of a city council is not invalid for want of proof of due notice of the meeting, where it appears from the record of the vote taken that all of the members were present. *Id.*

6. A charter provision that no suit shall be maintained against a city on any account or claim until the same shall have been presented to the common council does not apply to actions *ex delicto*. *Snyder* v. *City of Albion*, 275.

7. A city is chargeable with constructive notice of the defective condition of a bridge within its jurisdiction, where the defect is of such long standing and of such character as actually to arrest the attention of passers-by, or of persons inspecting the bridge. *Id.* 276.

8. In the absence of statutory restrictions, a municipal contract for electric lighting is not invalidated by the fact that the city has no money on hand, at the time the contract is made, which can lawfully be applied to such purpose. *Mitchell* v. *City of Negaunee*, 359.

9. The city of Negaunee was authorized under its charter, and the provisions of Act No. 186, Pub. Acts 1891, as amended, to submit the question of acquiring an electric light plant to the electors at a special election. *Id.*

10. Vacant lands included within the corporate limits of a city but so remote as to receive no benefit from the installation of a plant for electric lighting, are yet subject to taxation for the improvement, if the legislature, in the exercise of its discretionary authority to determine and establish taxing districts, makes no discrimination in their favor. *Id.*

11. It is within the province of the legislature to confer upon municipalities, under proper restrictions, the right to install plants for municipal lighting and to furnish light to their citizens. *Id.*

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MUNICIPAL CORPORATIONS—Continued.

12. Under Act No. 366, Local Acts 1895, § 4, empowering the board of estimates of Detroit to disallow any items or parts of items of the various estimates referred to it, and making it unlawful for the common council to expend any moneys as to items thus specifically disallowed, the city has no authority to pay an official the salary fixed by the common council after the board of estimates has reduced the amount. *Attorney General* v. *City of Detroit*, 494.

13. A clerical error in a resolution of the common council granting permission to a lot owner to construct a private sewer in the street, whereby authority was given to construct the sewer upon the "westerly" instead of the "easterly" side of the street, as contemplated by all the parties, will not abridge the rights of the owner in a sewer constructed and maintained for several years upon the easterly side. *Boyden* v. *Walkley*, 609.

14. A city having no sewer system of its own may grant to a citizen, under proper circumstances and restrictions, the right to construct a private sewer in the streets at his own expense, which may be used by him without interference by other citizens. *Id.*

15. A city has no proprietary interest in the public streets which entitles it to compensation when a street is vacated on petition of the abutting owners. *In re Albers' Petition*, 640.

16. A city ordinance providing for a reasonable inspection of all poles used by an electric light company within the city, to ascertain whether the same are secure, and making the cost of such inspection a charge against the company, is valid, where the statute under which the company was organized gives to the municipal authorities the right to prescribe "reasonable regulations" for the conduct of its business. *City of Saginaw* v. *Swift Electric Light Co.*, 660.

17. But a charge of 50 cents per annum for each pole so inspected, when the actual cost of inspection is about five cents only, is unreasonable. *Id.*

18. A city cannot justify the imposition of unreasonable burdens upon an electric light company, to which it has granted by ordinance the right to erect its poles in the streets upon conditions stated, under the power reserved to it in a subsequent ordinance relating to such company to amend, alter, or repeal the latter ordinance. *Id.*

See BRIDGES; EXEMPTIONS (2); HIGHWAYS; INJUNCTION (2); NEGLIGENCE (2, 3); STREET RAILWAYS (2–4); TAXES (10); WATER COMPANIES.

MUSICAL SOCIETIES.

The real estate of musical societies incorporated under Act No. 128, Sess. Laws 1857 (1 How. Stat. chap. 149), is by section 8 of the act expressly made subject to taxation the same as other real estate, and hence it does not come within subdivision 4 of section 7, Act No. 206, Pub. Acts 1893, providing

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MUSICAL SOCIETIES—Continued.

that such real estate as shall be owned and occupied by library, benevolent, charitable, educational, and scientific institutions shall be exempt while occupied solely for the purposes for which they were incorporated. *Attorney General* v. *Common Council of Detroit*, 388.

MUTUAL BENEFIT ASSOCIATIONS—See INSURANCE (6, 7).

MUTUAL INSURANCE COMPANIES.

1. The power conferred upon the directors of a mutual fire insurance company by 1 How. Stat. § 4253, to make such by-laws, not inconsistent with the Constitution and laws of the State, as may be deemed necessary for the government of its officers and members and the conduct of its affairs, authorizes a by-law requiring the secretary to cancel any risk which, in his opinion, is unsafe; and such by-law is not contrary to public policy. *Douville* v. *Farmers' Mut. Fire Ins. Co.*, 158.

2. The by-laws of a mutual insurance company are a part of the insurance contract, as binding upon the member as the policy itself. *Id.*

NAME OF PARTY—See JUSTICES OF THE PEACE (2).

NAME, RIGHT TO USE OF—See CORPORATIONS (1); VOLUNTARY ASSOCIATIONS.

NAVIGABLE STREAMS—See RIPARIAN RIGHTS (2).

NEGLIGENCE.

1. The proprietor of a grain elevator is not liable for injuries to a customer occasioned by the giving way of a railing about an elevated platform, even though he had knowledge of its defective condition, where the customer, at the time of the accident, was putting the railing to a use other than that for which it was intended, by leaning against it for support. *Kinney* v. *Onsted*, 96.

2. The fact that the immediate cause of a horse's backing over the unguarded approach to a bridge was that he took fright at a crack in the flooring of the bridge, which, by reason of the action of wind and snow, had apparently largely increased in width, does not render the absence of barriers on the approach so remote a cause of the accident as to prevent a recovery therefor against the township having control of the bridge, based upon its negligence in this respect, if the situation was such as to be calculated to frighten horses of ordinary gentleness. *White* v. *Township of Riley*, 295.

3. The absence of side railings along the approach to a bridge is the proximate cause of an accident to one who, while driving in the usual track, without fault on his part, is precipitated over the embankment by reason of his horse's stumbling and becoming unmanageable. *Shaw* v. *Township of Saline*, 342.

4. The rule that where an injury occurs that cannot be accounted for, and the occasion of it rests wholly in conjecture, the case may fail for want of proof, will not be extended so as to

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NEGLIGENCE—Continued.

deny a right of action to an injured person where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon his theory than upon that of the defense. *Schoepper* v. *Hancock Chemical Co.*, 382.

5. Whether the inference suggested by plaintiff's theory as to the cause of an explosion of nitroglycerine, whereby her intestate had been killed, was the correct one, or whether it was sufficiently rebutted, was a question for the jury, upon evidence that the explosion occurred a few hours after an attempt had been made to change the method of conveying the compound, by employing for the purpose a rubber hose; that, upon its appearing that the plan was impracticable, the hose had been permitted to remain attached at one end to a tank, and filled with so much of the compound as failed to escape at the open end; and that the compound contained acids which would generate gases and cause an explosion; and evidence in rebuttal that nitroglycerine explodes at 380 deg. Fahrenheit, and that hose of the size employed would not stand the pressure occasioned by the generation of that degree of heat. *Id.*

6. The question whether an electric light company could have known, by the exercise of reasonable skill, that attaching a bracket and wire to a brick cornice would subject it to a strain which, by reason of its frail construction, would render it liable to fall and injure pedestrians, was for the jury, upon evidence that the building was brick-veneered, that it had been built 22 years, that the front was cracked, and that it was otherwise in bad condition. *Swanson* v. *Menominee, etc., Power Co.*, 603.

See BRIDGES; CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; MUNICIPAL CORPORATIONS (1–3, 7); PLEADING (3, 6); RAILROAD COMPANIES (1, 4–7); STREET RAILWAYS (1).

NEGOTIABLE PAPER—See BILLS AND NOTES.

NEWSPAPERS.

A charter provision requiring a notice to be published in each of the public newspapers printed in the city does not include newspapers printed in foreign languages. *Auditor General* v. *Hutchinson*, 245.

See FRAUDULENT CONVEYANCES (2–4); LABOR DEBTS.

NITROGLYCERINE, EXPLOSION OF—See NEGLIGENCE (5).

NOMINAL DAMAGES—See APPEAL AND ERROR (12).

NOTICE.

Possession by one claiming through the purchaser under a land contract is constructive notice of his rights to a subsequent mortgagee of the vendor. *Van Baalen* v. *Cotney*, 202.

See BRIDGES (1–3); DISTRAINED BEASTS; ESTATES OF DECEDENTS (2, 4, 5); MUNICIPAL CORPORATIONS (1, 3, 5, 7); NEWSPAPERS; RECORDING LAWS.

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OCCUPANCY—See EJECTMENT (1, 2).

OPENING DECREE—See EQUITY PRACTICE (2).

ORDINANCES—See MUNICIPAL CORPORATIONS (16–18).

PARENT AND CHILD—See PAYMENTS.

PAROL EVIDENCE—See DEEDS (2).

PART PAYMENT—See STATUTE OF LIMITATIONS (1).

PARTIES—See COVENANTS (4); PARTNERSHIP (8); RES JUDICATA (1, 3).

PARTNERSHIP.

1. It is not necessary, in order to render the several members of a partnership liable for treble damages in trespass, that knowledge of the circumstances showing the trespass to have been willful and intentional should be brought home to each partner. *Gates* v. *Comstock*, 127.

2. An agreement between copartners upon the dissolution of the firm, whereby one partner assumes all of the firm debts, will not, of itself, support the subsequent promise of a creditor to release the other partner from liability. *Motley* v. *Wickoff*, 231.

3. The promise of one partner to pay a debt of the firm, if made to the creditor himself, may afford a sufficient consideration for the release of his copartner. *Id.*

4. A partnership is dissolved when it ceases to do the business for which it was organized. So *held* where a banking firm closed the doors of its bank, and did no business thereafter except to collect its accounts and liquidate its debts. *Potter* v. *Tolbert*, 486.

5. The partner intrusted with a settlement of the partnership affairs after the dissolution of the firm is not authorized to give notes in settlement of partnership debts, unless such right is conferred upon him by the other partners. *Id.*

6. While an execution creditor of an individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of partnership debts and the adjustment of accounts between the partners. *Kunze* v. *Cox*, 546.

7. A levy, therefore, upon the interest of one partner in a specific pile of partnership lumber, which does not include the whole partnership property, is invalid. *Id.*

8. Partners have a joint right of action for the conversion of partnership property under an invalid levy and sale upon an execution issued against one of the partners. *Id.*

See CONTRACTS (2); LIMITED PARTNERSHIPS; RECEIVERS (2).

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PAYMENTS.

1. Payment made by a mother to the owner of goods taken by the former's daughter cannot be recovered back on the ground of duress, although the owner was pressing for payment, and there was a dispute as to the value of the goods taken, where there was no threat by the owner of a prosecution of the daughter for a criminal offense, and the payment was voluntarily arranged for on one day, and the amount paid on the next after consulting a lawyer. *Francis* v. *Hurd*, 250.

2. But where the circumstances are such as to justify an inference of bad faith on the part of the owner, whether a recovery should be had on the ground of fraud and overreaching is a question for the jury, under proper instructions. *Id.*

See EVIDENCE (4); EXECUTORS AND ADMINISTRATORS (1); STATUTE OF LIMITATIONS (1); TRIAL (11).

PERSONAL INJURIES.

1. Evidence that the plaintiff in an action for personal injuries had led the life of a common prostitute for five years prior to the time of receiving the injuries for which suit is brought is admissible, in connection with evidence that the physical conditions ascribed by plaintiff to the injuries commonly result from sexual excesses. *State* v. *City of Detroit*, 643.

2. Where, in an action for personal injuries, there is evidence that the conditions ascribed by plaintiff to such injuries were due in part to a pre-existing disease, it is the duty of the jury, if they find such theory to be established, to determine to what extent the pain, suffering, and disability were increased by reason of the injury, and to allow a reasonable compensation for such increase of pain, suffering, and disability and for the expense incurred on account thereof. *Schwingschlegl* v. *City of Monroe*, 683.

See EXPERT TESTIMONY; MARRIED WOMEN; MASTER AND SERVANT; MUNICIPAL CORPORATIONS (1–3); NEGLIGENCE; PLEADING (3, 4, 6); RAILROAD COMPANIES (1, 4–7); STREET RAILWAYS (1).

PHYSICIANS—See WITNESSES (1).

PLANK-ROAD COMPANIES—See TOLL ROADS.

PLATS—See HIGHWAYS; TOWN PLATS.

PLEADING.

1. Plaintiff, having declared on the common counts alone in justice's court, cannot amend his declaration in the circuit on appeal by adding a special count for breach of contract. *Frohlich* v. *Graulich*, 65.

2. Plaintiff brought *assumpsit* in justice's court upon a written lease, but did not file with the justice the instrument sued upon. Defendant pleaded the general issue, with notice of set-

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PLEADING—Continued.

off, recoupment, and failure of consideration, and, upon his appeal from an adverse judgment, added a notice that he would insist upon the further defense that his signature to the lease, if it was in fact signed by him, was obtained without consideration. Plaintiff, upon the trial, offered proof of the execution of the lease, and introduced it in evidence. *Held*, that evidence that defendant was induced to sign by fraudulent representations as to the character of the paper was competent under the pleadings. *Bly* v. *Brady*, 176.

3. Plaintiff's intention to rely upon structural as well as surface defects in a bridge, by the collapse of which she claims to have been injured, is sufficiently indicated by the averment in her declaration that the defendant allowed its sidewalk and bridge "to become and remain broken, torn up, and out of repair, and not reasonably safe and convenient for public travel," and that, "while the plaintiff was walking over said walk and bridge, said sidewalk and bridge, by reason of its being in an unsafe, broken, torn up, and out of repair condition, broke and fell into the river." So *held*, at least, where, though no demurrer had been interposed, want of notice of the exact nature of the claim was urged to defeat the verdict. *Snyder* v. *City of Albion*, 275.

4. A declaration for personal injuries need not set out all of the results of the injuries claimed to have been sustained in order to render evidence of them admissible upon the trial. *Id.*

5. A justice's summons recited that the action was "in a plea of trespass on the case upon promises, to plaintiff's damage $100 or under." The bill of particulars read: "The following is the plaintiff's bill of particulars for the recovery of which action is brought: * * * One bedroom suit * * * $52." A statement of account filed showed defendant's indebtedness to plaintiff to be $52, attached to which account was an affidavit that defendant was indebted in said amount, and that the consideration therefor was furniture. The declaration was in trover for the conversion of one bedroom suit, of the value of $52, and claimed damages in the sum of $100. After defendant had pleaded the general issue, plaintiff discontinued, and brought another action in trover. The defense proceeded upon the theory that plaintiff had elected to sue in *assumpsit*. *Held*, that the intention to sue in trover in the former suit was sufficiently indicated by the limiting of the *ad damnum* clause in the summons, the language of the bill of particulars, and the style of the declaration. *Sligh Furniture Co.* v. *Shannon*, 473.

6. Under a declaration against a street-railway company for personal injuries, alleging negligence on the part of the company in running its car against the plaintiff's wagon, evidence of the following facts and circumstances was held admissible: That plaintiff was on the track; the rate of speed of the car; that the wagon-box fell on plaintiff, and that he subsequently spit blood; the general condition of the track, and that one track was higher than the other. *Bush* v. *St. Joseph, etc., R. Co.*, 513.

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PLEADING—Continued.

7. The common counts constitute a sufficient declaration upon a contract performed by the plaintiff, where nothing remains but the payment of money. *White* v. *Taylor*, 543.

See AMENDMENTS; ASSUMPSIT; EQUITY PLEADING; RAPE (1).

POISONS—See ACCIDENT INSURANCE.

POLES, INSPECTION OF—See MUNICIPAL CORPORATIONS (16, 17).

POLICE POWER—See CONSTITUTIONAL LAW (1).

POSSESSION OF LANDS—See ADVERSE POSSESSION; NOTICE.

POWER OF ATTORNEY.

An instrument purporting to be a power of attorney, authorizing the attorney to collect the rents from mortgaged premises and apply them upon the mortgage, and assigning the rents, not only from the leases then in existence, but from those thereafter to be made, as security for the mortgage debt until it should be fully paid, is not revoked by the death of the mortgagor. *Kelly* v. *Bowerman*, 446.

PRACTICE IN CIRCUIT COURT—See AMENDMENTS; BILLS AND NOTES (2); FRAUD (1); JUSTICES OF THE PEACE; TRIAL.

PRACTICE IN SUPREME COURT—See APPEAL AND ERROR.

PRELIMINARY EXAMINATION—See CRIMINAL LAW (3, 4).

PRELIMINARY INJUNCTION—See INJUNCTION (2).

PRESUMPTIONS—See CRIMINAL LAW (4); WILLS (1, 2, 7).

PRINCIPAL AND AGENT.

1. One who sells cabbages not yet ready for the market to an agent held out to the public as having authority to contract for future delivery is not bound by a secret limitation between the principal and the agent that only cabbages ready for market can be contracted for by the latter. *Baker* v. *Barnett Produce Co.*, 533.

2. The president of a corporation who accepts from a prospective purchaser of corporate stock a written contract for the purchase of one share, together with a sum of money to be applied upon the purchase price, may, as a part of the same transaction, consent to the annulment of such contract, and to the substitution of an oral agreement that the payment should be so applied only if an option to purchase two shares should be exercised, and that otherwise it should be returned to the purchaser. *White* v. *Taylor*, 543.

See CUSTOM; RAILROAD COMPANIES (4–6); STATUTE OF LIMITATIONS (1).

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PRINCIPAL AND SURETY.

The contention that a stockholder's relation to the corporation with respect to goods sold and delivered to it is that of surety, and that an extension of time to the corporation by taking its acceptance at a certain number of days for the purchase price operates to release the surety, is not applicable to a case where the giving of the acceptance is one of the terms of the contract under which the sale was made. *Kirkpatrick* v. *Mehalitch*, 631.

See GUARANTY.

PRINTING—See COSTS (2).

PRIORITIES—See MECHANICS' LIENS (5).

PRIVATE SEWERS—See MUNICIPAL CORPORATIONS (13, 14).

PRIVILEGE—See ATTORNEYS AT LAW (1, 2).

PRIVILEGED COMMUNICATIONS—See WITNESSES (1).

PRIVITY OF CONTRACT—See CONTRACTS (2).

PROBABILITIES—See CONTRACTS (4, 5); EVIDENCE (5).

PROMISSORY NOTES—See BILLS AND NOTES.

PROXIMATE CAUSE—See BRIDGES (6); NEGLIGENCE (2, 3).

PUBLIC HEALTH—See CONSTITUTIONAL LAW (1).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (10).

PUBLIC LANDS—See RIPARIAN RIGHTS (1).

PUBLIC POLICY—See ESTOPPEL (4); MUTUAL INSURANCE COMPANIES (1).

PUBLIC TRIAL, RIGHT OF—See CONSTITUTIONAL LAW (4).

PUBLIC USES—See EXEMPTIONS (2).

PUBLICATION—See NEWSPAPERS; TAXES (7, 8).

QUIETING TITLE—See EQUITY PLEADING (1); EVIDENCE (7).

RAILINGS—See BRIDGES (5, 6, 9); NEGLIGENCE (1-3).

RAILROAD COMPANIES.

1. A railroad company is not liable for injuries to a trespasser or bare licensee resulting from his falling over a semaphore wire while crossing the right of way of the company. *Clark* v. *Michigan Cent. R. Co.*, 24.

2. Section 47 of Act No. 206, Pub. Acts 1893, as amended by Act No. 229, Pub. Acts 1895, provides: "If any person shall neglect to pay any tax assessed to him, the township treasurer shall collect the same by seizing the personal property of such person, * * * from which seizure no property shall be exempt." 1 How. Stat. § 2, subd. 12, provides that, in the

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RAILROAD COMPANIES—Continued.

construction of statutes, the word "persons" may extend and be applied to corporate bodies. *Held*, that the seizure and sale of the personal property of a railroad company to satisfy a tax assessed against its lands is thereby expressly authorized. *Chicago, etc., R. Co.* v. *Ellson*, 30.

3. Coal belonging to a railroad company, and stored in its sheds, designed for, but not in actual use in, the operation of its locomotives, is personal property, subject to levy and sale under a tax warrant. *Id.*

4. A brakeman on a freight train has no implied authority to eject trespassers. *Randall* v. *Chicago, etc., R. Co.*, 115.

5. The fact that the rules of a railroad company prohibit the carrying of passengers upon freight trains, and that brakemen are required to familiarize themselves with the rules of the company, does not establish the authority of a brakeman upon such a train to eject one who boards the same for the purpose of taking passage thereon, where the rules further provide that brakemen shall be under the orders of the conductor. *Id.*

6. A railroad company is not liable for injuries to a trespasser ejected from a train by a brakeman who had no authority to eject him. *Hartigan* v. *Michigan Cent. R. Co.*, 122.

7. A road-master, being prevented by illness from accompanying a work train sent out to distribute railroad ties along the right of way, placed a section foreman in charge of the train, with instructions as to the loading, removing, and handling of the ties. No general power was conferred upon the foreman to make up and send out trains, to determine when and where they should go, to employ and discharge workmen, or to represent the road-master other than upon the particular occasion, and in accordance with his instructions. *Held*, that the foreman did not become a vice principal of the company, so as to render it liable for injuries to one of the workmen resulting from the negligence of the foreman while in charge of the train. *Morch* v. *Toledo, etc., R. Co.*, 154.

8. *Minneapolis, etc., R. Co.* v. *Marble*, 112 Mich. 4, involving title to a right of way, approved. *Marble* v. *Minneapolis, etc., R. Co.*, 191.

9. Where it is necessary, for the common convenience of the public and a railway company, that the latter should leave unfenced a portion of its right of way where a spur joins the main track, it incurs no liability by reason thereof to the owner of a steer which strays upon the track through the opening, and is killed. *McDonald* v. *Minneapolis, etc., R. Co.*, 484.

See CARRIERS; CONTRIBUTORY NEGLIGENCE (5).

RAPE.

1. Under an information charging, in separate counts, rape and improper liberties with the person of a female child, where the evidence does not exclude either theory, the case may properly be submitted to the jury upon both counts. *People* v. *Walker*, 367.

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RAPE—Continued.

2. Upon a prosecution for taking improper liberties with the person of a female child six years of age, the admission of evidence that the complaining witness had stated that she had previously been subjected to similar treatment by another person, the accused having no connection therewith, is not prejudicial error. *Id.* 368.

RECEIVERS.

1. An insolvent corporation executed a mortgage upon its goods and chattels in trust for certain creditors, and, upon application, a receiver was appointed. Other creditors attacked the transaction as fraudulent, among whom was a city, which threatened to take legal steps to secure a claim for taxes. The receiver thereupon assured the attorneys for the city that a prospective purchaser of the stock covered by the mortgage insisted, as one of the conditions of purchase, that the taxes be paid, and promised, if the city would forbear interfering with the sale by an attempt to enforce payment of the taxes, to reserve out of the proceeds the amount due. Upon the completion of the sale, the receiver, at the demand of the preferred creditors, denied liability upon the promise. *Held*, that the retention of the benefits of the sale, effectuated through the city's forbearance, rendered the agreement binding. *Union Trust Co.* v. *Mabley & Co.*, 478.

2. A receiver of partnership property should not be appointed against the objection of surviving partners, at the solicitation of the representatives of a deceased partner, against whom a suit has been instituted by the survivors for an accounting and to enable them to purchase the share of the deceased, where the survivors are abundantly responsible, and able to do justice on a final accounting, and there is no tangible evidence that they are wronging the representatives of the deceased. *Comstock* v. *McDonald*, 626.

See VENDOR AND PURCHASER.

RECEIVING STOLEN PROPERTY—See LARCENY.

RECORDING LAWS.

1. A *lis pendens*, under 2 How. Stat. § 6619, is effectual from the date of filing as notice of the claims made in the bill, irrespective of whether service upon all of the defendants therein is at the time complete. *Lockwood* v. *Noble*, 418.

2. A purchaser of a note secured by a mortgage on land to which the mortgagor had no title at the time, which fact would have been disclosed by an examination of the records, is entitled to no benefit under the mortgage. *Id.*

See DEEDS (1).

REFORMATION OF DEED—See MISTAKE.

RELEASE OF PARTNER—See PARTNERSHIP (2, 3).

RELEASE OF SURETY—See PRINCIPAL AND SURETY.

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RELIGIOUS SOCIETIES.

1. Where the constitution of a religious society provides that it shall not be altered except by request of two-thirds of the whole society, amendments involving substantial changes, proposed and adopted by the general conference otherwise than in accordance with the constitutional provision, are invalid, and those members, though a minority, who adhere to the original constitution, are entitled to the possession of the real estate belonging to such society. *Lemp* v. *Raven*, 375.

2. Where all of the members and officers of a voluntary religious organization for years recognized themselves and the organization as belonging to the Evangelical Association of North America, submitted to its rules and discipline, and were supported in part by the general conference, it was not within the power of a bare majority of the local organization to withdraw from the association, and deprive those persons who represented the regularly organized body of the church, and were its regular appointees, from using the church property. *Fuchs* v. *Meisel*, 559.

REMEDY—See ELECTION OF REMEDIES.

RENEWAL—See LIMITED PARTNERSHIPS (1).

RENTS AND PROFITS—See EQUITY PRACTICE (1); MORTGAGES (2); POWER OF ATTORNEY; VENDOR AND PURCHASER.

REOPENING CASE—See TRIAL (8).

REPEAL OF STATUTE—See STATUTES

REPLEVIN.

1. Under 2 How. Stat. § 8341, providing that in actions of replevin the jury shall, if they find for the plaintiff, assess the damages for the unlawful taking and detention, the expense of replacing a building wrongfully removed is properly included in the verdict, and is not a part of the taxable costs. *Byrnes* v. *Palmer*, 17.

2. 2 How. Stat. § 8374, which provides that, in replevin for beasts distrained, the failure of plaintiff to give the proper bond within the time limited for that purpose shall be deemed a discontinuance by him of his suit, is to be construed with the general statute (section 7771) relative to the amendment of defective bonds, and, so construed, affords no authority for the circuit judge to dismiss a suit summarily, upon his own motion, because the bond filed has but one surety. *Bublitz* v. *Trombley*, 413.

REQUESTS TO CHARGE—See TRIAL (3, 7, 10, 11).

RES GESTÆ—See EVIDENCE (4).

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RES JUDICATA.

1. A judgment in replevin in favor of the vendor of goods, based upon the fraud of the purchaser, is not *res judicata* as to one to whom the goods were mortgaged before the claim of fraud was made. *Vincent* v. *Hansen*, 173.

2. The Supreme Court reversed a judgment in favor of one who had appealed to the circuit court from the disallowance by commissioners of his claim against a decedent's estate, for error in permitting a recovery upon an alleged oral contract, when, as was found, claimant's own evidence showed a contract in writing. Thereafter, permission to amend the pleadings so as to set up a breach of trust under the written contract was refused by the circuit judge, and *mandamus* to compel the allowance of the amendment was denied in the Supreme Court, without discussion of the merits. The claim sought to be so interposed was subsequently disallowed in the probate court, and an appeal was taken to the circuit. *Held*, that the effect of the previous decision was not to render the controversy *res judicata*, but merely to determine what should be the basis of the judgment, and that the denial of *mandamus* did not affect the issue. *Sullivan* v. *Ross' Estate*, 311.

3. A decision on the hearing of a suit in equity, that the complainants are proper parties to the bill, renders the question *res judicata* in a supplemental proceeding by them in aid of execution based upon the decree in such suit. *Campbell* v. *Western Electric Co.*, 333, 337.

4. An insurance company which has unsuccessfully defended an action upon a policy, payable to a mortgagee as his interest may appear, upon the ground of misrepresentation with reference to the ownership of the mortgage, cannot have the question retried in equity upon a bill to enjoin the collection of the judgment. *Farmers' Fire Ins. Co.* v. *Johnston*, 426.

5. The fact that the company was not allowed in the action at law to put in all of its proof, because of the condition of its pleadings, cannot be urged in support of the equitable remedy, where it does not appear that it asked leave to amend its pleadings so as to render such proof admissible. *Id.*

6. While a mere trespasser is entitled to no lien upon logs for labor and expenses as against the owner, the latter cannot, in replevin for the logs, deny upon that ground the validity of a lien established in proceedings under 3 How. Stat. § 8427*e et seq.*, wherein he was served, appeared, and defended the action. *Carr* v. *Brick*, 664.

See ESTOPPEL (1); EXECUTORS AND ADMINISTRATORS (7).

RESCISSION—See ASSUMPSIT (1); FRAUD (3, 7); MORTGAGES (1).

RESULTING TRUST—See FRAUDULENT CONVEYANCES (6).

RETURN—See ATTACHMENT (4); CERTIORARI; JUSTICES OF THE PEACE; LOG-LIEN PROCEEDINGS.

RIGHT OF WAY—See RAILROAD COMPANIES (8).

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RIPARIAN RIGHTS.

1. A grant by the government of a fractional quarter section of land does not give the grantee any right as a riparian owner to lands in an adjoining section, where the land granted does not border upon any lake or stream. *Stark* v. *Miller*, 465.

2. The title of the riparian owner to submerged lands along navigable waters, and his right of access thereto, are subject to the paramount right of the United States to use the land in aid of navigation, without compensation to the owner, in such manner as it shall determine to be necessary. *Scranton* v. *Wheeler*, 565.

See WATERS (1).

SAFE PLACE—See MASTER AND SERVANT (1–4, 6).

SAFEGUARDS—See MASTER AND SERVANT (3).

SALARIES—See MUNICIPAL CORPORATIONS (12).

SALE—See CONSIDERATION; ESTOPPEL (2, 3); PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; RES JUDICATA (1).

SCHISM—See RELIGIOUS SOCIETIES; VOLUNTARY ASSOCIATIONS.

SCHOOLS AND SCHOOL DISTRICTS.

1. A district school board has no authority to discharge as incompetent a teacher employed by it under 2 How. Stat. § 5065; the determination of the question of competency being for the board of examiners, which issues the certificate of qualification, and which possesses the power, under 2 How. Stat. § 5155, to annul the same in case of mistake. *Carver* v. *School District No. 6*, 524.

2. A teacher who complies with the conditions of his contract with the local board in relation to the listing of pupils does not subject himself to lawful dismissal by failing to keep the "grade register" prescribed by the superintendent of public instruction. *Id.*

3. A school district has the burden of showing, in an action by a teacher wrongfully discharged, that plaintiff might have obtained other employment in the same line, and thereby reduced his damages. *Id.*

SCIENTIFIC INSTITUTIONS—See TAXES (9).

SERVICE OF PROCESS—See ATTACHMENT (4); ATTORNEYS AT LAW (1, 2); CONSTITUTIONAL LAW (2, 3); LOG-LIEN PROCEEDINGS; WRIT AND PROCESS.

SETTLEMENT.

1. A stipulation for the discontinuance of an action upon a promissory note against an indorser recited that the suit had been compromised and settled in full. Plaintiff thereafter instituted a new action upon the note, setting up in a special count that he had stipulated to discontinue the former case upon defendant's promise to give him a new note, and that the

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SETTLEMENT—Continued.

promise had never been fulfilled. Defendant, upon the trial, claimed that the note sued upon was turned over by him in payment of plaintiff's claim, and that it was never protested, so as to hold him as an indorser; that the agreement to discontinue the former suit was unconditional, except as shown by the stipulation itself. Plaintiff's testimony tended to show that the note was taken merely as collateral security, and that the conditions of the discontinuance of the former suit were as set up in his declaration. The jury were instructed that plaintiff could not recover if the note was taken in payment, or if the controversy had been settled by stipulation; but that if a fraud was practiced upon the plaintiff in the settlement, and the note was taken as collateral security merely, he should recover. *Held*, that the case was fairly submitted under the pleadings and the evidence. *Levy* v. *O'Leary*, 423.

2. Defendant was charged by the administrator of his mother's estate with a loan of $500. In a conference at the probate office, defendant admitted having received $350, and produced notes for the amount, signed by himself, which he claimed had been returned to him by the deceased upon her receiving payment. The probate judge pronounced the notes forgeries, and a new note for $350 was finally given by defendant and accepted by the administrator. *Held*, that evidence of these facts in an action upon the note warranted an instruction as to the law governing compromises of disputed claims. *Schulz* v. *Schulz*, 502.

3. In any event, the instruction as to compromises could not have been prejudicial to defendant, where the jury were also charged that if it should be found that he gave notes to deceased for the $350 which he borrowed of her, and that he paid these notes, he would not be liable in the case. *Id.*

See FRAUD (3).

SETTLEMENT OF CASE—See APPEAL AND ERROR (7).

SEWERS—See INJUNCTION (1); MUNICIPAL CORPORATIONS (13, 14).

SIDEWALKS—See CONTRIBUTORY NEGLIGENCE (2, 4, 6); MUNICIPAL CORPORATIONS (1–3).

SLANDER—See LIBEL AND SLANDER.

SPECIAL PARTNER—See LIMITED PARTNERSHIPS.

SPECIAL QUESTIONS—See TRIAL (1, 13, 14).

SPECIFIC PERFORMANCE.

A parol agreement by parents to convey to their son lands adjoining their own in consideration of his making his home thereon, and working and improving the same, may, if the son fulfills the conditions, be specifically enforced by his wife and children after his decease. *Briggs* v. *Briggs*, 371.

SPECULATIVE DAMAGES—See DAMAGES.

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STATUTE OF FRAUDS.

1. An admission in writing of the existence of a trust resting in parol is sufficient to satisfy the statute of frauds. *Eipper* v. *Benner*, 75.

2. The statute of frauds does not apply to a trust in personal property. *Id.*

3. The tender of a deed of lands, pursuant to the written offer of the person named as grantee to pay a specified price therefor, does not, even in the absence of a preceding oral acceptance, complete a contract for the sale of land, complying with the requirement of the statute of frauds that such contracts, to be binding, shall be in writing, signed by the party by whom the sale is to be made. *Kroll* v. *Diamond Match Co.*, 196.

See FRAUDULENT CONVEYANCES (6).

STATUTE OF LIMITATIONS.

1. The stockholders of a corporation, who join in executing a promissory note for its accommodation, do not, even though it is understood that the corporation shall pay the note, thereby constitute it their agent to make payments upon the indebtedness, so that such payments will arrest the running of the statute of limitations in their favor. *Patterson* v. *Collier*, 12.

2. The period in which title to land will become absolute by limitation depends upon the statute in force at the time the right of action accrues to the owner. *McKenzie* v. *A. P. Cook Co.*, 452.

See ADVERSE POSSESSION; EJECTMENT (5); MECHANICS' LIENS (3).

STATUTES.

3 How. Stat. § 9191*a*, provides a penalty for the willful neglect of an executor or administrator to deliver over to his successor in trust upon order of the court, within 30 days, all goods, chattels, money, or effects of the deceased which he has received and appropriated to his own use. Act No. 51, Pub. Acts 1895, purporting to be amendatory thereof, extends the time for compliance to 60 days, and increases the maximum penalty for disobedience, but contains no saving clause. *Held*, that the earlier statute was repealed by the later one, and that no conviction could thereafter be had for a violation of the former. *People* v. *Hiller*, 209.

See CONSTITUTIONAL LAW; ESTATES OF DECEDENTS (7); INTOXICATING LIQUORS (6).

STOCK—See BANKS AND BANKING.

STOCKHOLDERS, LIABILITY OF—See CORPORATIONS (3); STATUTE OF LIMITATIONS (1).



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STREET RAILWAYS.

1. The question of the negligence of a street-railway company was for the jury, in an action for personal injuries resulting from a collision, where there was evidence that the plaintiff, who was driving upon the track, was seen by the motorman of defendant's car for a sufficient distance to have enabled him to avoid the accident had he been more prompt in reversing the car, although it appeared that plaintiff had ample time to leave the track upon hearing the gong, but was prevented by the slipping of the wheels of his heavily-loaded wagon against the rails. *Bush* v. *St. Joseph, etc., R. Co.*, 513.

2. Under 1 How. Stat. § 3548, providing that no street-railway company shall construct a railway in the streets of any municipality until it shall have accepted in writing the terms and conditions upon which it is permitted to use such streets, a city may properly reserve the right to forfeit the franchise of a company in case of its failure to pay the cost of paving between its tracks. *Union St. Ry. Co.* v. *Saginaw Circuit Judge*, 694.

3. The inability of the company to make such payment affords no legal excuse for its default. *Id.*

4. Where the franchise of a street-railway company provides that it may be forfeited by the city for a breach of condition, and the fact of a breach is undisputed, there is no necessity for the city to resort to the courts before proceeding to enforce the forfeiture by removing the tracks from the streets. *Id.*

See CONTRIBUTORY NEGLIGENCE (3); INJUNCTION (2); PLEADING (6).

STREETS—See HIGHWAYS.

SUBSTITUTED SERVICE—See ATTACHMENT (4).

SUMMER RESORTS—See INTOXICATING LIQUORS (6).

SURETYSHIP—See PRINCIPAL AND SURETY.

TAXES.

1. The auditor general is justified in withholding a deed of land sold for delinquent taxes under the tax law of 1893, where it appears that the taxes were paid upon a part of the land within the time prescribed by law, and he is unable to determine upon what part the taxes were so paid. *Kneeland* v. *Auditor General*, 63.

2. Section 24 of Act No. 206, Pub. Acts 1893, which provides that assessments of property to one other than the owner shall show in what capacity it is assessed to him, does not limit the authority conferred upon the assessing officer by section 14, subd. 8, to assess forest products to the person "having control" of the premises where the same are situated, so as to require him to ascertain whether the property is held by such person as agent, guardian, or otherwise. *Spanish River Lumber Co.* v. *City of Bay City*, 181.

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TAXES—Continued.

3. That one who has control of a dock for the purpose of placing lumber thereon has sold part of the lumber placed upon it to another person, who is authorized to remove it, does not take from the former the control of that part of the dock containing the lumber sold, so as to prevent the assessment of such lumber against the seller, under Act No. 206, Pub. Acts 1893, § 14, subd. 8, providing that all forest products shall be assessed to the person having control of the dock where they are situated. *Id.*

4. A purchaser of bank stock prior to December 1st takes it free from any lien for taxes, under Act No. 206, Pub. Acts 1893, § 40, providing that all personal taxes shall become a lien on personal property on December 1st in each year, and shall take precedence of any sale, mortgage, or other lien executed or made "after" that date. *St. Johns Nat. Bank* v. *Township of Bingham*, 203.

5. A tax sale to the State is not subject to collateral attack on the ground that the land was not offered for sale a second time before being bid in to the State, as required by section 62 of the tax law of 1889 (3 How. Stat. § 1170*g*1), where the owner of the land, although appearing in the proceeding in which the decree of sale was made, took no steps to set aside the sale within the time prescribed by section 66 for filing objections to confirmation. *Hilton* v. *Dumphey*, 241.

6. Under the curative provision of the tax law of 1893 (Act No. 206, § 99), the fact that a city assessor delivered the original tax roll to the treasurer, instead of a copy, as provided by the charter, and that the treasurer failed to verify his return of uncollected taxes within the specified time, will not defeat a proceeding by the auditor general to enforce the tax by a sale of the land. *Auditor General* v. *Hutchinson*, 245.

7. The affidavit of publication of the auditor general's petition for the sale of lands delinquent for taxes, and of the order of hearing thereon, required by Act No. 206, Pub. Acts 1893, § 66, to be filed in the office of the county clerk before any final order is made, is valid if properly sworn to before a notary, whose attestation appears thereon, though not signed by the affiant. *Wynkoop* v. *Grand Traverse Circuit Judge*, 381.

8. The affidavit is not rendered invalid by the omission to state that the newspaper in which the publication was made is "circulated" in the county where the delinquent lands are situated, if that fact clearly appears from the petition and order themselves, and from the certificate of the auditor general designating such paper for making the publication. *Id.*

9. It is not enough, in order to render an association exempt from taxation under subdivision 4 of section 7, Act No. 206, Pub. Acts 1893, providing that such real estate as shall be owned and occupied by library, benevolent, charitable, educational, and scientific institutions shall be exempt while occupied solely for the purposes for which they were incorporated, that one of its direct or indirect purposes or results

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TAXES—Continued.

is benevolence, charity, education, or the promotion of science, but it must be organized chiefly, if not solely, for one or more of these objects. *Attorney General* v. *Common Council of Detroit*, 388.

10. A city whose treasurer is authorized, but not required, to sell and transfer to any person who shall pay the tax or assessment, with costs and charges, all of the interest of the city in unredeemed land bid in by the city, does not lose its interest in land purchased at a tax sale, by an offer of a prospective mortgagee of the land, on behalf of the owner, to pay to the treasurer all the taxes due thereon; nor is it affected by the omission of such sales from a statement by the treasurer purporting to show the entire amount of unpaid taxes, upon which the mortgagee relied in making the loan. *Gray* v. *City of Detroit*, 657.

See BANKS AND BANKING (1); DRAINS; EQUITY JURISDICTION; HUSBAND AND WIFE (3); MUNICIPAL CORPORATIONS (4, 10 12); MUSICAL SOCIETIES; RAILROAD COMPANIES (2, 3): RECEIVERS (1); TELEPHONE COMPANIES.

TEACHERS—See SCHOOLS AND SCHOOL DISTRICTS.

TELEPHONE COMPANIES.

The property of telephone companies organized under Act No. 129, Pub. Acts 1883 (3 How. Stat. chap. 102*a*), is exempt from local taxation, it being declared by section 8 of the act that such companies shall be subject to taxation in accordance with Act No. 168, Pub. Acts 1881 (1 How. Stat. § 1237 *et seq.*), which provides for a general tax, the rate of which is to be determined by a state board, "in lieu of all other taxes, state and local." *Attorney General* v. *Common Council of Detroit*, 388.

TENANCY IN COMMON.

To make possession adverse as against a cotenant, notice of the hostile claim must be clearly brought home to him. *Weshgyl* v. *Schick*, 22.

TIMBER—See ASSUMPSIT (2); TRESPASS.

TITLE TO LANDS—See EQUITY PLEADING (1); IMPROVEMENTS

TOLL ROADS.

A plank-road company incorporated under the general act of 1848 (1 How. Stat. chap. 96), and having the right, under section 17 of the act (1 How. Stat. § 3582), to exact tolls from persons traveling on the road in a specified sum "for every vehicle, sled, sleigh, or carriage drawn by animals," has no authority to require toll of a bicyclist. *Murfin* v. *Detroit & Erin Plank-Road Co.*, 675.

TOMBSTONES—See EXECUTORS AND ADMINISTRATORS (2).

TORTS—See ASSUMPSIT (2).

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TOWN PLATS.

Any question as to whether chapter 32, 1 How. Stat., providing for "the recording of town plats, and for vacating the same," is applicable to city plats as well, has been settled in the affirmative by legislative and judicial recognition. *In re Albers' Petition*, 640.

See HIGHWAYS.

TOWNSHIPS—See BRIDGES; NEGLIGENCE (2, 3).

TREBLE DAMAGES—See PARTNERSHIP (1); TRESPASS (2, 3).

TRESPASS.

1. In an action for trespass to land by cutting the timber thereon, an instruction that the measure of damages is the depreciation in the value of the land by reason of the trespass, and that the value of the stumpage, while proper to be considered by the jury, is not conclusive upon the amount of the recovery, is not improper, although the value of the land consisted exclusively in the timber, where there is testimony showing the value of the real estate both before and after the trespass. *Gates* v. *Comstock*, 127.

2. In such case, interest on the amount of damages from the date of the injury is allowable, and, where included in the verdict, is to be treated as a part of the damages for the purposes of 2 How. Stat. § 7957, providing for treble damages in actions of trespass. *Id.*

3. A trespass is willful and intentional, authorizing the trebling of damages under said statute, where it appears that the defendant and his employés knew the location of the boundary line between defendant's land and that of the plaintiff before the trespass was committed. *Id.*

4. In trespass for cutting timber, evidence of the cost to plaintiff of that portion of the tract of land upon which the trespass was committed, based upon the purchase price for the entire tract, and the comparative value of the timber upon the two portions, is competent upon the question of damages, where such purchase price was based on the stumpage. *Id.*

See ASSUMPSIT (2); PARTNERSHIP (1).

TRESPASSERS—See RAILROAD COMPANIES (1, 4–6).

TRIAL.

1. The defendant in an action for personal injuries, wherein the issue was alleged negligence in the construction of a platform, submitted a special question for the jury as to whether the plaintiff was hurt because he was knocked off the platform by a belt. This the court modified by adding the words, "and without other cause." The jury found a general verdict for the plaintiff, but answered the special question in the affirmative. Thereupon plaintiff's attorney discussed, in the presence of the jury, the probability of their having misunderstood the question, and asked the court to ascertain in regard thereto. The court declined to interrogate them, and

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TRIAL—Continued.

discharged them from the case, but immediately thereafter permitted counsel to poll them as to the special question. Upon the poll a juror stated that he believed the question was not put to them with the words added by the court, and that the answer returned was therefore not his verdict. The jury were again sent out, and upon their return answered the question in the negative. *Held*, that it was error to permit the discussion in the presence of the jury, and then to recall them after they had been discharged, and send them back to reconsider their verdict. *Zimmerman* v. *Detroit Sulphite Fibre Co.*, 1.

2. The exclusion of evidence as to the rental value of property, upon an issue as to its value, is not reversible error, where the witnesses whose answers are excluded are permitted to testify to the actual value. *Byrnes* v. *Palmer*, 17.

3. Failure to give a specific request is not error if the subject-matter is fully and carefully covered in the general charge. *Brundage* v. *Shelly*, 20.

4. In an action of ejectment by a wife's administrator against the heirs of her deceased husband, defendants' attorney offered in evidence a tax deed acquired by the husband in the lifetime of the wife, stating that he proposed to follow it up by proof of adverse possession. The admissibility of the deed was questioned, and the court inquired if defendants proposed to build up title under the deed, and also asked if there was any claim that the statutory period began to run from the death of the wife. Defendants' counsel refused to concede that they relied wholly upon the deed, or to base their claim solely on adverse possession subsequent to the death of the wife, but stated that they would "build title of possession up under the deed from the time it was given." The court thereupon rejected the evidence, and directed a verdict for the plaintiff. *Held*, that defendants should have been allowed to introduce their proofs relating to adverse possession. *Ward* v. *Nestell*, 185.

5. A volunteered statement of defendant, sued for the conversion of a promissory note alleged to have belonged to plaintiff's decedent, that the plaintiff, as executor, admitted, when the note was produced, that it belonged to defendant, does not require the reversal of a judgment in her favor, where the statement was promptly stricken out with the consent of her counsel, and the jury were cautioned against giving it consideration. *Harris* v. *Cable*, 192.

6. That one is the managing director of a newspaper will not justify counsel in referring to him, in garnishment proceedings for the amount of a judgment against the paper for libel, as the man "who sits in his sanctum, where nobody can see the hand that writes, nobody can see the brain that works, and writes sensational articles against citizens of his own town, as he wrote the article on which this judgment was rendered," where the fact that such person had nothing to do with the publication of the libelous article is established by the court's having directed verdict in his favor in the original suit. *Long* v. *Evening News Ass'n*, 261.

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TRIAL—Continued.

7. A defendant has no absolute right to have the instructions preferred by him reserved until after those proposed by the plaintiff have been passed upon, the matter being entirely within the discretion of the court. *Shaw* v. *Township of Saline*, 342.

8. It is within the discretion of the court to permit the plaintiff to reopen the case and introduce further direct testimony after the defendant has rested, although the practice is not approved. *Minkley* v. *Township of Springwells*, 347.

9. The Supreme Court declined to reverse a judgment because of objectionable remarks of counsel, made in the course of the examination of witnesses and the argument to the jury, where the trial court promptly informed counsel that the remarks were improper and should not have been made. *Ford* v. *Cheever*, 440.

10. After giving a specific instruction, the court read a request of the defendant which covered the precise point in different language, and said: "I think I will decline it. It is good law, but I do not think it necessary for that language." *Held*, equivalent to saying that he did not deem it necessary to repeat an instruction already given. *Schulz* v. *Schulz*, 502.

11. An instruction that the fact that defendant, at a specified time four years before the trial, took $208 from his house, and soon after returned without the money and with a $200 note, was evidence of its payment, was properly modified by stating that this would be true if in fact the jury should "believe that he did so," there being evidence that the $200 note produced by defendant as the same note was freshly written. *Id.*

12. It is only in a case where the testimony of a witness is not only unopposed by direct evidence, but where it is not in conflict with the just and proper inferences to be drawn from other facts proved in the case, that it is proper for the court, in giving his instructions, to treat the evidence as wholly undisputed. *Id.* 503.

13. A general verdict should not be received without compelling an answer to special questions, involving important and material testimony. *Rathbun* v. *Parker*, 594.

14. A special finding by the jury that a certain wire, with respect to the maintenance of which an electric light company was alleged to have been negligent, was a dead wire, as set forth in the declaration, cures any error in the submission of the case upon the theory that it was immaterial whether the wire in question was a dead or a live one. *Swanson* v. *Menominee, etc., Power Co.*, 603.

See AMENDMENTS; APPEAL AND ERROR; BASTARDY; CONTRACTS (3); CRIMINAL LAW (1); JURY; LIBEL AND SLANDER (3, 4); MUNICIPAL CORPORATIONS (2); RAPE.

TROVER—See CONVERSION; PARTNERSHIP (8); PLEADING (5).

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TRUSTS AND TRUSTEES.

V., after the death of his wife, in order to avoid suit for an accounting in the interest of certain of her heirs, admitted in writing that he had received funds from her to a specified amount, which amount he thereby agreed, pursuant to a confessed understanding with the wife, to bequeath to such heirs. Thereafter V. made a will which was in substantial conformity with his engagement, but such will was destroyed before his death. *Held*, that there was a declaration of trust, entitling the beneficiaries to an allowance of their claim against the estate. *Eipper* v. *Benner*, 75.

See ESTATES OF DECEDENTS (1); FRAUDULENT CONVEYANCES (6); STATUTE OF FRAUDS (1, 2).

ULTRA VIRES—See CORPORATIONS (2).

UNDUE INFLUENCE—See WILLS (1, 2, 5, 7–9, 11).

UNSURVEYED LANDS—See INTOXICATING LIQUORS (5).

USAGE—See CUSTOM.

VACATION OF STREETS—See HIGHWAYS; MUNICIPAL CORPORATIONS (15).

VENDOR AND PURCHASER.

A receiver, appointed to collect the rents and profits of premises pending foreclosure proceedings under a contract providing that, on default of the purchaser, the vendor may re-enter without notice, may be required to pay over to complainant the money so received, to apply upon a deficiency remaining after sale, where the purchaser seeks to appropriate such funds, to the exclusion of complainant's claim. *Belding* v. *Meloche*, 223.

See COVENANTS; DEEDS (2); HOMESTEAD; NOTICE; STATUTE OF FRAUDS (3).

VENDOR'S LIEN.

A wife, as executrix and sole legatee of her deceased husband, may enforce a vendor's lien upon real estate conveyed by him in his lifetime, although she has, for convenience, exchanged the notes originally given to him for the purchase price for new notes of like date and amount, payable to herself. *Curtis* v. *Clarke*, 458.

VESTED RIGHTS—See ESTATES OF DECEDENTS (7).

VICE PRINCIPAL—See RAILROAD COMPANIES (7).

VILLAGES—See BRIDGES (5).

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VOLUNTARY ASSOCIATIONS.

1. While members withdrawing from a fraternal society are not at liberty to associate themselves under a name so like the name of the parent order as to be calculated to deceive ordinary persons proceeding with ordinary care, they may, subject to this limitation, use any derivative of such name that they may see fit to employ. *Supreme Lodge K. of P.* v. *Improved Order K. of P.*, 133.

2. The name "Improved Order Knights of Pythias," adopted by withdrawing members of the Knights of Pythias, is not calculated to mislead, and therefore its use will not be enjoined. *Id*

See CORPORATIONS (1); RELIGIOUS SOCIETIES.

WAIVER—See APPEAL AND ERROR (2); CARRIERS; DISTRAINED BEASTS; ESTATES OF DECEDENTS (5); INSURANCE (1, 3, 4, 7); VENDOR'S LIEN; WATER COMPANIES (1).

WARRANT—See CRIMINAL LAW (3, 4).

WARRANTY—See COVENANTS.

WATER COMPANIES.

1. The right secured to a board of water commissioners by charter to treat with the owner of an office building, rather than with the several tenants, is not waived by its superintendent's unauthorized act in assessing water rates, at the owner's request, to the tenants, upon the understanding that the owner should remain liable if the tenants failed to pay. *Kelsey* v. *Board of Fire & Water Com'rs of Marquette*, 215.

2. The duty of furnishing water separately to each tenant of a building, and collecting rates from each as a separate consumer, cannot be imposed by the owner of the premises on the board of water commissioners by furnishing at his own expense, for each room, shut-offs with locks and keys, and then tendering the keys to the commissioners. *Id.*

WATERS.

1. The fee to an unsurveyed island in one of the Great Lakes, situated several hundred feet distant from the mainland, is in the State, and not in the riparian owner. *Sherwood* v. *Commissioner of State Land Office*, 227.

2. An island lying contiguous to the mainland of the Upper Peninsula, between Detour Passage and St. Joseph Island, is within the waters of Lake Huron, and not in St. Mary's river. *Id.*

See RIPARIAN RIGHTS.

WILLS.

1. The presumption of undue influence arising from the fact that the husband of the principal beneficiary had acted as the attorney of the testatrix in some matters of business, though not in the drawing of the will, may be rebutted by showing that she made her will after receiving independent legal advice. *In re Bromley's Estate*, 53.

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WILLS—Continued.

2. A contestant of a will cannot complain on appeal that the jury were not instructed that the proponent had the burden of overcoming the presumption of undue influence, which arose from the confidential relationship existing between the testatrix and the beneficiary, where he failed to prefer such a request. *Id.*

3. In the contest of a will, proponents' counsel, for the avowed purpose of showing the interest of one of the contestants, who was sworn as a witness, cross-examined her closely as to whether certain of the contestants had not professed a willingness in the probate court to withdraw from the contest. The witness had previously frankly admitted her ill feeling towards proponents. *Held*, that the examination was not competent for the purpose stated. *Bush* v. *Delano*, 321.

4. The inquiry, however, was made competent by contestants' placing in evidence a letter written by one of the proponents, in which the decision of the contestants previously mentioned to withdraw from the contest was asserted; it being proper to show that this was not a misstatement. *Id.*

5. The extent to which a testator had aided or failed to aid his immediate relatives is a pertinent inquiry, where the will is contested on the grounds of incompetency and undue influence. *Id.*

6. While individual instances of forgetfulness on the part of a testator do not show mental incapacity to make a will, an instruction that forgetfulness has no tendency to prove a want of capacity is erroneous. *Id.* 322.

7. The rule that the burden of proving that a will was obtained by undue influence rests upon the contestants is qualified where the will was drawn by one named as legatee therein; the burden in such case being upon the proponents to show that the instrument was in all respects fair and honest, and expressed the will of the deceased. *Id.*

8. Undue influence in the procurement of a will need be established by a preponderance of the evidence only. *Maynard* v. *Vinton*, 59 Mich. 153, in so far as it implies that the proof must be inconsistent with any hypothesis but that of undue influence, disapproved. *Id.*

9. In so far as the testator's state of mind is material in the contest of a will for mental incapacity and undue influence, declarations by him to the effect that he intended to make provision by will for certain relatives are admissible; but not for the purpose of showing that undue influence was exerted over him by other legatees. *Id.*

10. A testator bequeathed to his wife all of his household goods, and gave her a life estate in the residue of his property, real and personal. Specific bequests were made to five persons, who were also made residuary legatees in proportion to the sums bequeathed to them. It was further provided that, if any of said legatees should be dead at the time of the decease of the wife, the heirs of such deceased legatee should take the legacy bequeathed to him. The widow elected to take

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WILLS—Continued.

under the law, and not under the will. *Held*, that the legatees were entitled to an immediate distribution of the estate. *In re Schulz's Estate*, 592.

11. The admission of the testimony of a witness for the contestant of a will, as to what her husband told her with reference to the intention of the proponent to keep them away from the testator, is prejudicial error. *Hurton* v. *Hurton*, 634.

12. A power of disposal annexed to a devise to testator's wife of all of his property, to be used "as she may desire and wish for and during the term of her natural life," will not necessarily defeat a devise in fee to take effect after the death of the wife, if it was the manifest intention of the testator that the power should only be exercised by the wife if required for her proper maintenance and support. *Gadd* v. *Stoner*, 689.

13. In the absence of an express limitation upon the power in the will itself, the law will affix that of good faith, and a conveyance made with the obvious purpose of subverting the intent of the testator will be ineffectual to pass a fee. *Id.*

14. The grantee under such a conveyance, who gives back an agreement to support the grantor during her lifetime, may take an estate for the life of the grantor, with a lien upon the land for all services that he may render under his agreement to support, less the value of the use of the land. *Id.*

See APPEAL AND ERROR (10).

WITHHOLDING DEED—See TAXES (1).

WITNESSES.

1. The statement of the prosecutrix in a bastardy proceeding, to her physician, as to the paternity of her child, is not within the scope of 2 How. Stat. § 7516, prohibiting the disclosure of any information acquired by an attending physician which was necessary to enable him to prescribe for his patient as a physician, or to do any act for him as a surgeon. *People* v. *Cole*, 83.

2. The matter of receiving children under 10 years of age as witnesses is by 3 How. Stat. § 7546*a*, made so far discretionary with the circuit court that its judgment in permitting a child of six years to testify upon its promise to tell the truth, elicited after a private examination in the judge's office, will not be interfered with, unless the abuse of discretion is clear. *People* v. *Walker*, 367.

3. Under 3 How. Stat. § 7545, one who files a bill to quiet title against the assigns of a deceased person, through whom he also claims by a prior conveyance, is incompetent to testify to matters which, if true, were equally within the knowledge of the deceased. *Bailey* v. *Holden*, 402.

4. The statute excluding testimony as to matters which, if true, were equally within the knowledge of deceased, does not apply to third persons not parties to the litigation. *Finch* v. *Modern Woodmen of America*, 646.

See EVIDENCE (1, 3); HUSBAND AND WIFE (1, 2); INTOXICATING LIQUORS (4); WILLS (3).

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WRIT AND PROCESS.

1. An admission of "due personal service" of subpœna by a defendant in another State is sufficient to confer jurisdiction upon a court of this State. *Jones* v. *Merrill*, 433.

2. It seems that the bare admission of the *fact* of service beyond the territorial jurisdiction of the court would not be deemed sufficient. *Id.*

See ATTACHMENT (4); ATTORNEYS AT LAW (1, 2); CONSTITUTIONAL LAW (2, 3); LOG-LIEN PROCEEDINGS.

WRIT OF ERROR—See APPEAL AND ERROR (9).

WRITTEN INSTRUMENTS—See PLEADING (2).

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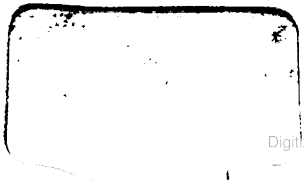

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